SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 237.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

COLUMBUS J. ESLIN, ADMINISTRATOR OF DANIEL A. CONNOLLY, DECEASED, ET AL.

APPEAL FROM THE COURT OF CLAIMS.

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Court of Claims.

COLUMBUS J. ESLIN, ADMINISTRATOR OF DANIEL A. CONNOLLY, deceased,
vs.
THE DISTRICT OF COLUMBIA, } No. 375.

RAWLEIGH W. DOWNMAN AND OSCEOLA C. GREEN,
vs.
THE DISTRICT OF COLUMBIA, } No. 280.

WILLIAM M. GALT,
vs.
THE DISTRICT OF COLUMBIA, } No. 162.

and

SAMUEL J. RITCHIE,
vs.
THE DISTRICT OF COLUMBIA, } No. 150.

Consolidated.

I.—*Pleadings in the case of Eslin, admr. of Connolly, No. 375, D. C.*

The claimant filed his original petition April 2, 1883. The
2 defendant filed a traverse February 25, 1884. The claimant, by leave of court, filed an amended petition December 2, 1885, and subsequently, to wit, on November 24, 1886, the claimant, by leave of court, filed a second amended petition, which is as follows:

COLUMBUS J. ESLIN, ADMINISTRATOR OF DANIEL A. CONNOLLY,
vs.
THE DISTRICT OF COLUMBIA. } No. 375. Filed November 24, 1886. J. R.

Amended petition.

(Filed by leave of court.)

To the Honorable the Court of Claims:

Your petitioner respectfully represents:

I. That he is the administrator of Daniel A. Connolly, deceased.

II. That heretofore, to wit, on the 24th day of April, 1872, the District of Columbia entered into a contract with the said Daniel A. Connolly, No. 243, whereby he was to grade Massachusetts avenue from New Jersey avenue to Lincoln square, in the city of Washington; that subsequently, to wit, on the 4th day of May, 1875, said contract was extended to embrace work upon B street south, C street north, A street south, D street north, Delaware avenue, E street north, 6th street east, and 1st street east; that subsequently, to wit, on the 16th day of October,

1875, said contract was extended to relay the old material on Massachusetts avenue, between New Jersey avenue and Lincoln square, wherever directed by the engineer of the District of Columbia; that at divers times various other extensions of said contract were made, and orders for extra work issued, particularly for work on 5th street east,
3 between D and H streets north; that the work under said contract, extensions, and orders for extra work, was fully performed by said Connolly, but that a balance is still due from the District of Columbia to this claimant on said accounts, amounting to $9,349.95, with interest.

III. That the District of Columbia entered into another contract, No. 1028, with said Daniel A. Connolly, to wit, on the 30th day of January, 1874, whereby said Connolly agreed to grade certain parts of C street north and 2d street east, in the city of Washington; that subsequently, to wit, on the 15th day of May, 1875, said contract was extended to embrace the replacing of old material on said streets wherever ordered; that the work under said contract and extension was fully performed by said Connolly, but that a balance is still due from the District of Columbia to this claimant on said accounts, amounting to $1,945.09, with interest.

IV. That the District of Columbia entered into another contract with said Daniel A. Connolly, No. 349, to wit, on the 24th day of June, 1872, to set the curbstones, lay and put down the brick foot-pavements, and pave the gutters on a part of 1st street southeast; that said Connolly fully performed the work under said contract, but that a balance is still due from the District of Columbia to this claimant on said account, amounting to $785.56, with interest.

V. That the District of Columbia entered into another contract with said Connolly, No. 665, to wit, on the 22d day of April, 1873, to grade, set the curb and lay brick foot-pavements on parts of B street north, and to grade alley in square No. 758; that said Connolly fully performed said contract, but that a balance is still due from the District to this claimant on said account, amounting to $556.25, with interest.

VI. That the said District of Columbia entered into another contract with said Connolly, No. 690, to wit, on the 20th day of May, 1873, to do certain grading and other work on parts of B street north and 1st
4 street east; that said work was fully performed by said Connolly, but that a balance is still due from the District to this claimant on said account, amounting to $30.49, with interest.

VII. That the said District of Columbia entered into another contract with said Connolly, No. 1035, to wit, on the 5th day of March, 1874, to grade, set the curbs, and lay brick foot-pavements on Carroll street; that said contract was fully performed by said Connolly, but that a balance is still due from the District to this claimant on said account, amounting to $42.53, with interest.

VIII. That the District of Columbia entered into another contract with said Daniel A. Connolly, No. 209, to wit, on the 20th day of January, 1872, to set the curbstones, lay and put down the brick foot-pavements, and the guttering on a part of 4th street east; that said Connolly fully performed the work under said contract, but that a balance is still due from the District to this claimant on said account, amounting to $199.92, with interest.

IX. That the said District of Columbia entered into another contract with said Connolly, No. 231, to wit, on the 18th day of April, 1872, to construct a sewer in front of square 732, connecting with the sewer of 2d street; that said work was fully performed by said Connolly, but that a balance is still due from the District to this claimant on said account, amounting to $1.73, with interest.

X. That the District of Columbia entered into another contract with said Connolly, No. 595, to wit, on the 12th day of November, 1872, whereby the said Connolly agreed to set the curbstones, and to pave the gutters on part of A street southeast, and to grade a part of A street southeast, in the city of Washington; that subsequently, to wit, on the 8th day of April, 1874, the District of Columbia entered into another contract with said Connolly, No. 1057½, to pave a part of A street southeast; that the work under said contracts was fully performed by said Connolly, but that a balance is still due from the District to this claimant on said accounts, amounting to $66.65, with interest.

XI. That the District of Columbia entered into another contract with said Connolly, No. 828, to wit, on the 8th day of August, 1874, to excavate and complete a sewer in alley in square 686; that said contract was fully performed by said Connolly, but that a balance is still due from the District to this claimant on said account, amounting to $300.04, with interest.

XII. That demand has been made upon the District of Columbia for the amounts above stated, but that no part thereof has been paid; that your petitioner is sole owner of said claim and the only person interested therein; that no assignment or transfer of said claim, or of any part thereof, has been made; that said claimant is justly entitled to the amount herein claimed, after allowing all just credits and offsets; that the claimant and said Daniel A. Connolly have, at all times, borne true allegiance to the Government of the United States, and have not in any way aided, abetted, or given encouragement to rebellion against the said Government; that he believed the facts as stated in this petition to be true.

Wherefore he prays judgment against the District of Columbia for $13,278.21, with interest.

CHARLES & WILLIAM B. KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

Columbus J. Eslin, being duly sworn, deposes and says: I am the claimant in this case, and have read the foregoing petition. The facts therein stated are true to the best of my information and belief.

COLUMBUS J. ESLIN.

Sworn to and subscribed before me this 23d day of November, 1886.

[SEAL.] WILLIAM TWOMBLY,
Notary Public in and for the District of Columbia.

Order of consolidation.

DECEMBER 14, 1885.

The motion to consolidate this case, No. 375, D. C., with numbers 162 and 280 vs. The District of Columbia was allowed by the court.

6 *In the case of Downman and Green, No. 280, D. C.*

The claimants filed their original petition December 15, 1880, which is as follows:

RAWLEIGH W. DOWNMAN AND OSCEOLA C. Green, claimants, *vs.* THE DISTRICT OF COLUMBIA, DEFENDANT. } No. 280. Filed Dec. 15, 1880. J. R.

To the honorable the Court of Claims:

The claimants, Rawleigh W. Downman and Osceola C. Green, respectfully represent:

I.

That they are citizens of the United States and of the District of Columbia.

II.

That heretofore, to wit, on the day of , A. D. , the board of public works for the said District entered into contracts Nos. 243 and 1028 with one D. A. Connolly.

By said contract No. 243 the parties thereto agreed that said Connolly should grade Massachusetts avenue between Lincoln square and New Jersey avenue, and on B, C, A, E, D, and Sixth streets, and Delaware avenue, and to relay old material on Massachusetts avenue, as in said contracts and extensions more particularly set forth, and should be paid therefor as therein set forth.

And by contract 1028 the parties thereto agreed that said Con-
7 nolly should grade G street between Second and Fifth streets, and Second street between Maryland avenue and D street, which was extended by the Commissioners to reset curbs and relay brick pavement on G street between Second and Fifth streets northeast, and should be paid therefor as in said contract and extension set forth.

That the said Connolly fully performed the said contracts on his part.

That the said D. A. Connolly executed to Downman and Green a power of attorney, and certain other instruments of writing, whereby he assigned unto the said Downman and Green, claimants, all his interests and rights under said contracts 243 and 1028, and in the other work herein below set forth, and in the payment therefor, and authorized the claimants to demand, collect, receipt for, and settle the said claims and demands under said contracts, and for said other work, and to credit all such receipts to said Connolly on his indebtedness to claimants. And claimants are entitled, in virtue of said instruments and assignments and in virtue of said

indebtedness still owing by said Connolly to claimants, to collect and receive said moneys herein named.

Claimants further say that of the amount due by the defendant to the said Connolly, under said contracts, claimants assigned and sold to Samuel J. Ritchie the sum of $7,050, with the accrued interest thereon, being the amount reported as found due to the said Connolly at the date when the work under said contracts was stopped in virtue of the act of Congress, and in this amount so assigned to Samuel J. Ritchie, and the interest thereon, these claimants have no interest or ownership.

Claimants further say that besides and in addition to the said amount and interest so assigned to the said Ritchie, there became due to the said Connolly, and which accrued to claimants under their said assignments, the following items:

8 The said Connolly was charged in his account under the said contract for old material which was afterwards accounted for to the said District, as near as claimants can now state, the sum of $2,800, and which claimants are now entitled to be paid, with interest.

The said Connolly became and is entitled, in compensation for work done under said contracts in excess of the said $7,050 so assigned to the said Ritchie, to the sum of $5,000, as near as claimants can now state.

Claimants further say that during the progress of said work under said contracts the authorities of the District of Columbia having lawful charge of that matter directed and required the said Connolly and those executing the said work under him to furnish the materials for and do a large amount of work upon Fifth street which was not strictly under the above-named contracts, but connected with said work.

The said work and materials so ordered on Fifth street were done and furnished by the said Connolly and his subordinates in obedience to, and as required by, the said orders; and the said Connolly and his assigns, these claimants, became entitled to the price and value of said work and materials so done and furnished on Fifth street, which amounted, as near as claimants can now state, to the sum of $2,300.

Claimants can not state the exact amounts of the above-named claims, by reason of not having access to the books and papers where claimants believe the same can be accurately ascertained, being the books, records, and papers in the possession of the Commissioners of the District of Columbia.

That no assignment or transfer of the indebtedness aforesaid, or any part or item thereof, has been made by them, but each and every part thereof is due to them, as hereinbefore set forth.

That there is no just credit or set-off against the amounts hereinbefore set forth, or any part or item thereof, and that there is due to them on account of the said several sums the sum of $10,100, with interest

9 thereon, all of which is unpaid, and they pray that they may have judgment for the sum of $10,100, with interest on the several sums from the proper dates, when said dates shall be duly ascertained.

RAWLEIGH W. DOWNMAN,
Address: Washington, D. C.

SHELLABARGER & WILSON, *Attorneys,*
Rooms 20, 22, 23, Corcoran Building, Washington, D. C.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Rawleigh W. Downman, being first duly sworn, on oath says that he is one of the claimants as to the matters set forth in the foregoing petition, and that he has fully read the said petition, and that the matters and things stated in said petition are true to the best of affiant's knowledge and belief.

RAWLEIGH W. DOWNMAN.

Subscribed and sworn to by the above-named Rawleigh W. Downman, in the said District, before me, Wm. T. S. Curtis, a notary public therein and therefor, duly commissioned and qualified.

Witness my hand and seal notarial, this 15th day of December, A. D. 1880.

[SEAL.]

WM. T. S. CURTIS,
Notary Public, D. C.

Traverse—Filed February 11, 1882.

And now comes the Attorney-General, on behalf of the District of Columbia, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SEMONS,
Asst. Attorney-General.

10 *Order of consolidation.*

DECEMBER 14, 1885.

The motion to consolidate this case No. 280, D. C., with numbers 162 and 375, vs. District of Columbia, was allowed.

BY THE COURT.

APRIL 25, 1887.

On motion suggesting death of Rawleigh W. Downman, it was ordered that the suit be continued in the name of the surviving partner.

BY THE COURT.

In the case of William M. Galt, No. 162, D. C.

The claimant filed his original petition November 26, 1880, which is as follows:

11 WILLIAM M. GALT
vs.
DISTRICT OF COLUMBIA. } No. 162, D. C.

(Original petition filed Nov. 26, 1880.)

To the Honorable Justices of the Court of Claims:

The complainant, William M. Galt, respectfully represents:

1. That he is a resident of the District of Columbia and a citizen of the United States, and that he has at all times borne true allegiance to

the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the same.

2. That the defendant, the District of Columbia, is justly indebted unto him, after allowing all just credits and offsets, in the full sum of twenty-three hundred and twenty-seven dollars and ninety-one cents ($2,327.91), with interest thereon at the rate of six (6) per centum per annum from the 4th day of May, A. D. 1875, until paid, for this—

12 3. That heretofore, on or about the 24th day of April, A. D. 1872, a contract in writing was made and entered into by and between the said District of Columbia and one Daniel A. Connolly, whereby the said Connolly agreed to do the following work in the city of Washington for the use and benefit of the said District of Columbia: "Grade on Massachusetts avenue between Lincoln square and New Jersey avenue." This contract is known as No. 243.

4. That heretofore, on or about the 4th day of May, A. D. 1875, an extension, in writing, of the above contract was made and entered into by and between the said District of Columbia and the said Connolly, whereby the said Connolly agreed to do the following work in the city of Washington for the use and benefit of the said District: "An amount of grading on the following streets, equivalent to an amount relinquished on Massachusetts avenue between Lincoln square and New Jersey avenue, and the replacement of the old material, viz: B street, between 4th and Boundary streets, northeast; C street, between 4th and Boundary streets, northeast; A street, between 3d and Boundary streets, southeast; Deleware avenue, between C and Boundary streets; E street, between 2d street and N. J. avenue; First street, between C street north and Boundary street; D street, between 1st and Fourth streets, northeast; 6th street, between Massachusetts avenue and East Capitol street."

5. That on the 6th day of October, A. D. 1875, an extension, in writing, of the above contract was made and entered into by and between the said District of Columbia and the said Connolly, whereby the said Connolly agreed to do the following work in the city of Washington for the use and benefit of the said District: "Relay old material on Massachusetts avenue, between Lincoln square and New Jersey avenue."

13 6. That at various dates between the 4th day of May, 1875, when the extension described in paragraph No. 4 was made, and the 22d day of March, 1876, when the said contract and its extensions were cancelled, as hereinafter set forth, divers agreements for "extra work" were made and entered into by and between the said District of Columbia and the said Connolly, under which the said Connolly furnished material and did work for the use and benefit of said District in different places in the city of Washington, among others on 5th street, between D and H streets northeast.

7. That by the terms of the said extension of May 4th, 1875, and the said agreements or orders for "extra work" thereunder, it was contracted that the said Connolly was to receive for said work and materials compensation according to the rates and prices fixed by the board of public works of the said District for work of a similar character; and that payment for the same was to be made in the bonds of the said District issued by the sinking fund commissioners of the said District, under and by virtue of Section VII of the act of Congress entitled "An act for the Government of the District of Columbia and for other purposes," approved

June 20th, 1874, which said bonds were to be accepted by the said Connolly at their par value.

8. That the said Connolly well and faithfully executed and performed the work under the said contract No. 243, the extensions thereof, and agreements for extra work thereunder, according to the terms of the same, until the 5th day of February, 1876, at which date the further execution of the said work was suspended by order of the said District; that the said work was measured by engineer officers of the said District and was accepted by the same; that as the said work progressed, the said
14 measurements thereof being made by the said engineers from time to time, were presented to and duly approved and audited by the board of audit of the said District until the said board of audit was abolished, as hereinafter set forth; that the said board, until abolished, issued from time to time to the said Connolly "certificates" in payment of so much of the said work so measured and audited at the respective dates of the said certificates; that on the 14th day of March, 1876, the said board of audit was abolished, and no other provision of law was then or has since been made for the audit of such measurements as were left unaudited at that date, or as were subsequently made; that after the suspension of the said work by said order of date February 5th, 1876, final measurements were made by the engineer officers of the said District, at various dates, of all work done by the said Connolly under the said contract No. 243, extensions thereof and agreements for extra work thereunder; and that these "final measurements" showed that, after giving the District credit for all "certificates" of the said board of audit issued to the said Connolly as aforesaid, and allowing all offsets, there still remained due the said Connolly a balance of about ($2,327.91) twenty-three hundred and twenty-seven and $\frac{91}{100}$ dollars, which balance is still unpaid.

9. That on or about the 23d day of October, 1872, a contract, in writing, was made and entered into by and between the said District and one James W. Walsh, whereby the said Walsh agreed to do the following work in the city of Washington, for the use and benefit of the said District: "Grade Eleventh street between Pennsylvania avenue and H street northeast;" that on the 7th day of December, 1874, the said Walsh made an assignment of the said contract (which contract is known as No. 582) to one William Hussey, and the said District on the
15 same day ratified and accepted the same, and made and granted an extension of the said contract to the said Hussey, whereby the said Hussey agreed to complete the work called for by the said contract; that on the 8th day of April, 1875, a further extension, in writing, was made between the said District and the said Hussey, whereby the said Hussey agreed to do the following work in the city of Washington, for the use and benefit of the said District: "Grade an amount of grading equivalent to grading relinquished on Eleventh street, and reset curb and relay brick pavements where directed, viz, Tennessee avenue between Lincoln Square and 15th street east; Fifteenth street between H and East Capitol streets northeast; Fifth street between H and K streets northeast; Sixth street between H and K streets northeast; F street between New Jersey avenue and Seventh street northeast; Boundary street between First and Fifteenth streets east."

10. That on the 24th day of February, 1876, the said Daniel A. Connolly having done work and furnished material under the extension of

his contract No. 243, of date the 4th day of May, 1875, and agreements for extra work thereunder, on Fifth street between D and H streets northeast, applied to the engineer officers of the said District for measurement of the same; that in reply to such application, the said Connolly was informed by the said officers that the said work belonged under the extension, of date the 8th day of April, 1875, of contract No. 582 of the aforesaid William Hussey; that said Hussey had also applied for measurement of work done on the same street, but that the measurement would be made in the said Hussey's name and under the said contract No. 582, provided both the said Hussey and Connolly would give their assent, in writing, to that arrangement; that on the 21st day
25 of July, 1876, both the said Hussey and Connolly did so signify their assent to the same; that a measurement was thereupon made in the name of the said Hussey and under the said contract No. 582; that subsequently a measurement was also made in the name of the said Connolly, and the work credited to the said Connolly, under the extension, of date the 4th day of May, 1875, of his contract No. 243; and that both of the said measurements show a balance due and unpaid by the said District of twenty-three hundred and twenty-seven and $\frac{91}{100}$ dollars.

11. That on the 25th day of September, 1876, the said William Hussey, by an instrument in writing, and under seal, appointed one Thomas Joyce his attorney in fact to collect from and receipt for to the District of Columbia any money which was then or should thereafter become due him, the said Hussey, under his contract No. 582, and the several extensions thereof; that, at the time of the arrangements between the said Hussey, Connolly, and the District of Columbia, set out in the above paragraph, as to the work done by the said Connolly on 5th street between D and H streets northeast the said Hussey, by an instrument in writing and under seal, assigned to the said Connolly all his interest in the measurement of the said work, and appointed the said Connolly his attorney in fact for all purposes connected therewith; that on the same day the said Connolly, being justly indebted to the claimant Galt, made an assignment of all his interest in the said measurement to the said Galt, and constituted him his attorney in fact for all purposes connected therewith; and that on the same day the aforesaid Thomas Joyce executed, in proper form, a similar assignment and power of attorney to the said Galt, transferring to the said Galt all of his, the said Joyce's, interest in the said measurement, under the power of attorney from
17 Hussey to Joyce, of date the 25th day of September, 1875, made in connection with said Hussey's contract No. 582: Copies of these four powers of attorney and assignments are annexed hereto, marked respectively, "W. M. G. Exhibits A, B, C, and D."

12. That no other person, save this claimant, is in any manner interested in this claim.

Wherefore the claimant prays that he may have judgment against the District of Columbia for the sum of twenty-three hundred and twenty-seven dollars and ninety-one cents ($2,327.91), and interest thereon from the 4th day of May, 1875, at the rate of six per centum per annum until paid.

WILLIAM M. GALT.

WALTER S. PERRY,
Claimant's Attorney, Washington, D. C.

DISTRICT OF COLUMBIA, *City of Washington:*

I do solemnly swear that I have read the petition hereto annexed, and that I believe the matters and things set forth therein are true.

WILLIAM M. GALT.

Subscribed and sworn to by the above named William M. Galt, in the said District, before me, a justice of the peace therein, duly qualified and commissioned, this 30th day of April, A. D. 1881.

CHARLES WALTER, J. P. [SEAL.]

WALTER S. PERRY,
Claimant's Attorney, Washington, D. C.

18 "W. M. G. EXHIBIT A."

(Copy.)

Power of attorney.

Know all men by these presents, that I, William Hussey, of Washington, in the District of Columbia, for and in consideration as stipulated in the annexed agreement, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Thomas Joyce, of Washington, District of Columbia, my true and lawful attorney, for me, and in my name, place, and stead, to ask for, collect, receive, and give receipt for, any and all moneys, securities, certificates of indebtedness due and payable, or to become due and payable, to me for any and all work done for the District of Columbia by me under the provisions of contract No. 582 of the late board of public works, and all of its extensions, and such other additional work as may be hereafter awarded me under the provisions of said contract.

Giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present at the doing thereof, with full power of substitution and revocation; hereby ratifying and confirming all that my said attorney or his substitute may or shall lawfully do or cause to be done by virtue hereof.

In testimony whereof, I have hereunto set my hand and seal, this 25th day of Sept., eighteen hundred and seventy-five.

(Sgd.) WILLIAM HUSSEY. [SEAL.]
[SEAL.]

Fifty cent stamp required.
Two witnesses required.

(Signed) { A. Y. LAKEMAN.
{ JOSEPH C. ROCK.

19 DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, Charles S. Johnson, a notary public in and for the District and county aforesaid, do hereby certify that William Hussey, party to a certain power of attorney, bearing date on the 25th day of September, 1875, and hereto annexed, personally appeared before me in my office,

in the Dist. & county aforesaid, the said Wm. Hussey being personally well known to me as the person who executed said power of attorney, acknowledged the same to be his act and deed.

Given under my hand and official seal this 25th day of Sept., 1875.

[L. S.] (Signed) CHAS. S. JOHNSON, [NOTARIAL SEAL.]
Notary Public.

Five cent stamp required.

"W. M. G. EXHIBIT B."

(Copy.)

Assignment.

For a valuable consideration in hand paid by Daniel A. Connolly, of the city of Washington, in the District of Columbia, and received by me, I do hereby assign and transfer to the said Daniel A. Connolly and his assigns an interest to the extent and amomnt of twenty-three hundred and twenty-seven dollars ($2,327.00) in my claim against the District of Columbia, for monies due me for work and labor done by me for said District, under and by virtue of the terms of a certain contract between myself and said District, known as contract No. 582, to be collected and paid out of any monies due me under said contract, and I further authorize and empower the said Connolly to demand and receive the aforesaid sum of $2,327.00 from the District of Columbia and the authorized representatives thereof, the same to be by them deducted from the amount due me, and I further give and grant to the said Connolly full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises, as fully as I might or could do, with full power of substitution or assignment, and to receipt and sign all vouchers to the extent of the interest hereby assigned, hereby ratifying and confirming all that the said Connolly or his assigns may or shall lawfully do or cause to be done by virtue thereof.

In witness whereof I hereunto set my hand and seal this 31st day of July, 1876.

WILLIAM HUSSEY. [SEAL.]

Witness—
EDWIN FORREST.
WILLIAM BIRNEY.

DISTRICT OF COLUMBIA, *ss:*

Be it known, that on this 31st day of July, A. D. 1876, before me, the undersigned, a justice of the peace for the said District of Columbia, personally appeared William Hussey, described in, and who executed, the foregoing instrument of writing, and the same having been first fully read over to him and the contents thereof duly explained, acknowledged that he executed the same freely for the purposes therein stated, and I certify that the person who made the acknowledgement is personally known to me to be the individual described in and who executed the said instrument, and that I have no interest, present or prospective, in said claim.

WILLIAM HUSSEY.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Washington City, in said District, the day and year first above written, and the said William Hussey has subscribed his name to the above in my presence.

L. J. O'NEAL, *Justice of the Peace.* [SEAL.]

21 "W. M. G. EXHIBIT C."

(Copy.)

Assignment.

For a valuable consideration in hand paid by William M. Galt, of the city of Washington, in the District of Columbia, and received by me, I do hereby assign and transfer to the said William M. Galt and his assigns all my right, title, and interest acquired by virtue of a certain transfer or assignment heretofore made to me by one William Hussey, and dated the 31st day of July, A. D. 1876, in and to a certain claim heretofore presented against the District of Columbia by the said William Hussey, for monies due him for work and labor by him performed for said District, under and by virtue of a certain contract between the said William Hussey and the District of Columbia, known as contract No. 582.

The extent and the amount of the interest in said claim transferred by said William Hussey to me by said assignment is twenty-three hundred and twenty-seven dollars ($2327.00), and I do hereby authorize and empower the said William M. Galt to demand and receive the aforesaid sum of $2,327.00 from the District of Columbia and the authorized representatives thereof, the same to be by them paid out of and deducted from any monies due me under said contract by virtue of said assignment or otherwise.

And I further give and grant to the said William M. Galt full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises, as fully as I might or could do, with full power of assignment or substitution, and to receipt and sign all vouchers to the extent of the said interest hereby
22 assigned; hereby confirming all that the said William M. Galt or his assigns may or shall lawfully do or cause to be done by virtue hereof.

In witness whereof I hereunto set my hand and seal this 31st day of July, A. D. 1676.

DANIEL A. CONNOLLY. [SEAL.]

Witness—
EDWIN FORREST.
WILLIAM BIRNEY.

DISTRICT OF COLUMBIA, *ss:*

Be it known that on this 31st day of July, A. D. 1876, before me, the undersigned, a justice of the peace for the said District of Columbia, personally appeared Daniel A. Connolly, described in, and who executed the foregoing instrument of writing, and the same having been first fully read over to him and the contents thereof duly explained, acknowledged

that he executed the same freely for the purposes therein stated, and I certify that the person who made the acknowledgement is personally known to me to be the individual described in and who executed the said instrument, and that I have no interest, present or prospective, in said claim or assignment.

DANIEL A. CONNOLLY.

In testimony whereof I have hereunto set my hand and affixed my official seal at Washington city, in said District, the day and year first above written, and the said Daniel A. Connolly has subscribed his name to the above in my presence.

L. J. O'NEAL, [SEAL.]
Justice of the Peace.

23 "W. M. G. EXHIBIT D."

(Copy.)

Whereas William Hussey, of Washington city, D. C., has heretofore, and on the 25th day of Sept., 1875, authorized Thomas Joyce, by power of attorney, heretofore duly filed with the board of audit, to receive and receipt for all monies due and owing to the said William Hussey, under contract No. 582, made by the late board of public works with James W. Walsh, and assigned by him to said Hussey, and under the extensions of the said contract, which power of attorney was coupled with an interest and irrevocable; and

Whereas the said Hussey was indebted to Daniel A. Connolly in the sum of twenty-three hundred and twenty-seven dollars ($2327) for work done by said Daniel A. Connolly, as contractor, on Fifth street between D and H streets, northeast, in the city of Washington, which work has been measured under contract No. 582 by the engineer of the District, but has not been paid for, and the said Hussey desires to secure said Connolly, his assignee, William M. Galt, the amount due and owing, as aforesaid, to said Daniel A. Connolly, as subcontractor, and the said Thomas Joyce has no claim on said proceeds of contract No. 582, except subject to the deduction of said sum of $2,327 due said Connolly:

Now, therefore, at the request of said Hussey and Daniel A. Connolly, and by virtue of the power of attorney from said Hussey to me, as aforesaid, and of the power of substitution in said power of attorney,

Know all men by these presents, that I, Thomas Joyce, by virtue of the power of substitution aforesaid, of Washington city,
24 in the District of Columbia, have made, constituted, appointed, and substituted, and by these presents do make, constitute, appoint, and substitute William M. Galt to be the true and lawful attorney of said William Hussey, irrevocable, for said Hussey, and in his name, place, and stead, hereby annulling and revoking all former powers of attorney or authorization inconsistent therewith, to collect from and receipt for to the District of Columbia, the sum of twenty-three hundred and twenty-seven dolllars ($2327), being the amount due by said William Hussey, contractor, holding contract No. 582, to Daniel A. Connolly, subcontractor, for work done on Fifth street between D and H streets, northeast, Washington city, and which amount has been assigned by said Connolly to said William M. Galt for a valuable consideration,

and to, from time to time, furnish any further evidence necessary, or that may be demanded, giving and granting to the said attorney full power and authority to do and perform in my name all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, and in the name of said Hussey, or in my name, to receipt and sign all vouchers, and endorse, transfer, and sell all certificates, orders, and warrants; hereby ratifying and confirming all that the said attorney or his substitute may or shall lawfully do, or cause to be done, by virtue hereof, in the name of said Hussey, or in my name as attorney to said Hussey.

In witness whereof I hereunto set my hand and seal this thirty-first day of Jan'y, eighteen hundred and seventy-six.

(Signed) THOMAS JOYCE. [SEAL.]

Witness—
EDWIN FORREST.
WILLIAM BIRNEY.

25 ACKNOWLEDGMENT BY A PERSON KNOWN TO THE OFFICER.

DISTRICT OF COLUMBIA, *ss:*

Be it known that on this thirty-first day of July, A. D. 1876, before me, the undersigned, a justice of the peace for the said District of Columbia, personally appeared Thomas Joyce, described in, and who executed, the foregoing instrument in writing, and the same having been first fully read over to him, and the contents thereof duly explained, acknowledged that he executed the same freely for the purposes therein stated; and I certify that the person who made the acknowledgment is personally known to me to be the individual described in, and who executed, the said instrument, and that I have no interest, present or prospective, in said claim.

(Signature.) THOMAS JOYCE (maker).

In testimony whereof the party acknowledging has subscribed his name (or made his mark) to the above in my presence, and I have hereunto set my hand and affixed my seal of office, at Washington City, in said District, the day and year first above written.

[SEAL.] L. J. O'NEAL, [SEAL.]
Justice of the Peace.

26 Traverse—Filed June 15, 1881.

WILLIAM M. GALT
v.
DISTRICT OF COLUMBIA. } No. 162.

And now comes the Attorney-General, on behalf of the District of Columbia, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Asst. Atty. General.

Orders of consolidation.

MARCH 5, 1883.

WILLIAM M. GALT
vs.
DISTRICT OF COLUMBIA. } No. 162.

SAMUEL J. RITCHIE, PARAGRAPH 10,
vs.
DISTRICT OF COLUMBIA. } No. 150.

DOWNMAN AND GREEN
vs.
DISTRICT OF COLUMBIA. } No. 280.

Ordered that the motion of the defendant to consolidate these cases be allowed.

BY THE COURT.

DECEMBER 14, 1885.

Ordered that the motion to consolidate No. 375, D. C., with Nos. 162 and 280, D. C., be allowed.

BY THE COURT.

27 *In the case of Samuel J. Ritchie, No. 150, D. C.*

The claimant filed his original petition November 20, 1880, of which paragraphs I, X, and XX are as follows:

To the Honorable the Court of Claims:

The claimant, Samuel J. Ritchie, respectfully represents:

I.

That he is a citizen of the State of Ohio.

X.

That heretofore, to wit, on the day of , A. D. , the board of public works for the said District entered into contracts, Nos. 243 and 1028, with one D. A. Connolly.

By said contract, No. 243, the parties thereto agreed that said
28 Connolly should grade Massachusetts avenue between Lincoln square and New Jersey avenue, and on B, C, A, E, D, and Sixth streets and Delaware avenue, and to relay old material on Massachusetts avenue, as in said contracts and extensions more particularly set forth, and should be paid therefor as therein set forth.

And by contract 1028 the parties thereto agreed that said Connolly should grade G street between Second and Fifth streets, and Second street between Maryland avenue and D street, which was extended by the Commissioners to reset curbs and relay brick pavement on G street between

Second and Fifth streets northeast, and should be paid therefor as in said contract and extension set forth.

That the said Connolly fully performed the said contracts, and there is a balance due on account thereof of $7,050.

That the said D. A. Connolly executed to Downman & Green a power of attorney, fully authorizing and empowering them to collect, sell, and assign the amount so due, as aforesaid, with full power of substitution; and afterwards, to wit, on the 11th day of February, 1878, the said Downman & Green, being so empowered as aforesaid, sold and assigned the said amount so due, as aforesaid, to the claimant, and executed to him full power of attorney to collect the said amount on his own account, and the said sum yet remains due and is wholly unpaid.

XX.

And claimant further shows to the court that the contracts,
29 assignments, powers of attorney, statements of account, hereinbefore referred to, are in possession of the said defendant, excepting the assignments and powers of attorney by the said Betts, Gleason, and Whitney, and by reason thereof he is unable to give dates and amounts and terms of contract more specifically or with greater particularity than is hereinbefore set forth.

And he further shows to the court that the said several amounts hereinbefore named and set forth have been stated by the said defendant as being the balances respectively due on account of the contracts for work, labor, and materials hereinbefore referred to, and that the same appear by the books and papers of the said defendant, as claimant is informed and verily believes.

That no assignment or transfer of the indebtedness aforesaid, or any part or item thereof, has been made by him, but each and every part thereof is due to him as hereinbefore set forth. And claimant further avers that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States, and he believes the facts as stated in said petition to be true.

That there is no just credit, or set-off, against the amounts hereinbefore set forth, or any part or item thereof, and that there is due to him on account of the said several sums the sum of $35,583.91, all of which is unpaid.

30 He further shows to the court that by reason of not having access to the said books, contracts, and papers, he is unable to state definitely the date from which he is entitled to interest on the said several sums, and he prays that he may have judgment for the said sum of $35,583.91, with interest on the several sums from the proper dates when said dates shall be duly ascertained.

(Signed) SAMUEL J. RITCHIE.

SHELLABARGER & WILSON,
Attorneys.
(Rooms 20, 22, 23, Corcoran Building, Washington, D. C.)

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Samuel J. Ritchie, on oath, says that he is the claimant as to the matters set forth in the foregoing petition, and that he has fully read the said petition, and that the matters and things stated in said petition are true, to the best of affiant's knowledge and belief.

SAMUEL J. RITCHIE.

Subscribed and sworn to by the above-named Samuel J. Ritchie, in the said District, before me, William T. S. Curtis, a notary public therein and therefor, duly commissioned and qualified.

31 Witness my hand and notarial seal the twentieth day of November, A. D. 1880.

[SEAL.]

WM. T. S. CURTIS,
Notary Public, D. C.

Traverse.—Filed December 10, 1880.

SAMUEL J. RITCHIE
v.
DISTRICT OF COLUMBIA. } No. 150.

And now comes the Attorney-General, on behalf of the District of Columbia, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Asst. Atty. General.

Order of consolidation.

D. A. CONNOLLY, TO THE USE, &C.,
vs.
DISTRICT OF COLUMBIA. } No. 162.

SAMUEL J. RITCHIE (PARAGRAPH 10)
vs.
DISTRICT OF COLUMBIA. } No. 150.

DOWNMAN AND GREEN
vs.
DISTRICT OF COLUMBIA. } No. 280.

Ordered, that the motion on behalf of defendant to consolidate these cases be allowed.

BY THE COURT.

MARCH 5, 1883.

32 OCTOBER 31, 1887.

Opinion.

SCOFIELD, J., delivered the opinion of the court:

Daniel A. Connolly, in his lifetime, had a large number of written contracts with the District of Columbia for the improvement of the streets of Washington. His administrator brings this suit to recover alleged balances due on eleven of these contracts, with their so-called extensions.

In the three other suits, consolidated and tried with this one, the claims are based upon assignments from Connolly of portions of such balances.

The claims of Elsin, administrator of Connolly, as set forth in his petition, may be tabulated as follows:

Number of contract.	Date.	Balance claimed.
209	Jan. 2, 1872	$199.92
231	Apr. 18, 1872	1.73
1035	Mar. 5, 1874	42.53
243 and extensions	Apr. 24, 1872	9,349.95
349	June 24, 1872	785.56
595	Nov. 12, 1872	66.65
1057½	Apr. 8, 1872	
665	Apr. 22, 1873	556.25
690	May 20, 1872	30.49
828	Aug. 8, 1874	300.04
1028	Jan. 20, 1874	1,945.09
Total claimed		13,278.21

33 The balances claimed upon contracts Nos. 209, 231, and 1035 are admitted to be due, and amount to $244.18. The balance claimed on contract No. 828 is found to have been paid. These four contracts, therefore, are taken out of controversy.

The original contract, No. 243, stipulates that the price of grading shall be 30 cents a cubic yard, including 200 feet of "haul," and all hauling beyond that, 1 cent for every 200 feet. As the work progressed, partial measurements and payments were made from time to time at these rates. Subsequently, beginning with December 5, 1873, are four partial measurements, on which the extra haul was reckoned at 1¼ cents for every 100 feet. This change in reckoning makes a difference in favor of the claimant of $8,413.55. The computation was made by the District auditor or engineer, and the three last payments made through the board of audit.

The change in the rate of payment was doubtless made in pursuance of two orders by the board of public works, as follows:

July 15, 1873. Auditor was notified that the price for hauling earth has been established at 1¼ cents per cubic yard for every 100 feet of haul over first 200 feet, since June 1, 1873. Contract clerk so notified.

September 27, 1873. J. C. Lay, auditor, was notified that in settlements of accounts for extra haul, that one and one-quarter cents per cubic yard for each additional 100 feet beyond the first 200 feet for all work done since January 1, 1873, will be allowed.

These orders came to be called board rates.

Did these orders to the auditor authorize the claimant legally to demand or bind the District to pay more than the written contract provided for?

34 This question has been so fully discussed in the recent opinion of the Chief Justice in the case of Barnes v. The District of Columbia (22 Ct. Cls.) that it is unnecessary to go over the ground again. We held in these cases, as we held there, that these orders do not change the written contracts between the parties made before the orders were issued, and much less contracts made thereafter.

These higher rates having been allowed and paid by the board of audit, can the District recover back the excess? That question is also decided in the Barnes case in favor of the District. The question, however, does not properly arise under this particular contract. The work has never been fully settled. All payments made were only partial payments. In any event, there is still a balance due the claimant. The question rather is, whether when in a final settlement the District shall be credited with all money actually paid? That it should be so credited we have no doubt.

The same questions arise under contracts Nos. 349, 595, 1057½, 665, and 1028, and must be ruled in the same way.

Additional questions are presented in some of these cases.

On the same voucher some grading is computed at 30 cents and some at 40 cents; some of the extra haul at the contract rate and some at board rates. This fact, coupled with the fact that the District was not able to cash the auditor's certificates, is enough, the claimant argues, to support a legal presumption that part of the grading was on old
35 graveled streets, and part of the haul was outside the contract. All the other surrounding facts seem to be adverse to such a presumption. No mention or reference is made of grading on old graveled streets or of work done outside the contract, either in the measurements, computations, or receipts. All are stated as if done under the contract. Even if it could be assumed that part of the grading was done on old graveled streets, it is not at all certain that the claimant would be entitled to recover 40 cents a cubic yard.

It is true that in September, 1871, the board prescribed the rate of grading old graveled streets to the depth of 2 feet to be 40 cents a cubic yard, but at the same time they prescribed the rate of other grading at 20 cents. In January following they revised the price list and established the average rate grading at 30 cents, without exception or mention of graveled streets. This contract was made in the following June. In contract No. 1028, below, the clause which fixes the price of grading and haul are these words:

"Grading of old graveled streets for first per cubic yard cents." The contract is drawn on a printed blank. No effect can be given to the words quoted. If any reference were to be drawn from them, it would be that no grading on graveled streets was in contemplation. There is no evidence, unless presumed from the amount paid, that any was done.

Contract No. 690 provided for certain work to be done across two blocks on First street east. The work was done, and a similar kind of work was done at the same time across three additional and adjoin-
36 ing blocks. (Finding IX.) The haul on the whole five blocks was reckoned at board rates. So far as the extra work was concerned, that was right, but the work on the two blocks named in the contract, according to the foregoing ruling, we have reckoned according to the terms therein prescribed.

Applying these rules to the facts as found, the following results appear:

On contracts No. 209, 231, and 1035 there is due Connolly..	$244.18
On contract No. 243 and extensions, with the Hussey assignment	936.40
On contract No. 349	2.51
On contract No. 1028	1,645.09
Total	2,828.18

Overpayments to Connolly on—	
Contracts Nos. 595 and 1057, made January 27, 1875	$173.35
Contract No. 665, made February 9, 1875	1,012.37
Contract No. 690, made December 31, 1873	2,300.51
Total	3,486.23

Leaving a balance in favor of the District of $658.05.

The additional counterclaim consists of overpayments on contracts No. 447, 527, and 693, made, not to the claimant, but to Albert Gleason, assignee. The assignment does not specify any particular amounts assigned, but only all claims that may be allowed by the board of audit.

37 It does not appear that Connolly ever received the money or derived any benefit therefrom. We do not see upon what principle an assignor is chargeable with overpayments which he neither authorized nor received. (United States v. Jones, 8 Pet., 387.)

The counterclaim must be dismissed.

By a careful comparison of the dates of the papers under which the rights of the claimants in cases Nos. 150, 162, and 280 originated, with the dates of the overpayments, it appears that Connolly during all that time was indebted to the District. It is true that upon a settlement of some of the assigned contracts balances are now found to have been due to Connolly, but these balances could not be assigned so as to escape the set-off of balances then existing on other contracts in favor of the District.

In the cases Nos. 150, 162, and 280 the petitions are dismissed, and in No. 375 judgment will be entered in favor of the defendant in the sum of $658.05.

38 *Judgments entered October 31, 1887.*

At a Court of Claims held in the city of Washington, on the 31st day of October, 1887, judgment was ordered to be entered in the following cases, to wit:

COLUMBUS J. ESLIN, ADMR. OF DANIEL A. Connolly, dec'd, *vs.* DISTRICT OF COLUMBIA. } No. 375.

The court on due consideration of the premises, both for and against the District of Columbia and the claimant, upon the petition of the claimant and the counter claim of the defendant, finds upon the whole case that the claimant is indebted to the defendant in the sum of six hundred and fifty-eight dollars and five cents, and do order, adjudge,

and decree that the defendant, the District of Columbia, do have and recover of and from the said Columbus J. Eslin, as administrator of Daniel A. Connolly, deceased, the sum of six hundred and fifty-eight dollars and five cents ($658\frac{05}{100}$).

BY THE COURT.

OSCEOLA C. GREEN, SURVIVING PARTNER OF Downman and Green,
vs.
THE DISTRICT OF COLUMBIA. } No. 280.

The court on due consideration of the premises find for the defendant and do order, adjudge, and decree that the claimant's petition be dismissed.

BY THE COURT.

Oct. 31, 1887.

39 WILLIAM M. GALT
vs.
THE DISTRICT OF COLUMBIA. } No. 162.

The court on due consideration of the premises find for the defendant and do order, adjudge, and decree that the claimant's petition be dismissed.

BY THE COURT.

October 31, 1887.

SAMUEL J. RITCHIE
vs.
THE DISTRICT OF COLUMBIA. } No. 150.

The court on due consideration of the premises find for the defendant and do order, adjudge, and decree that the claimant's petition be dismissed.

BY THE COURT.

October 31, 1887.

40 In the Court of Claims. December term, 1887.

DOWNMAN & GREEN
v.
THE DIST. OF COL. } No. 280.

SAMUEL J. RITCHIE,
v.
THE DIST. OF COL. } No. 150.

Motion of claimants for new trial.—Filed November 18, 1887.

Now come the claimants, Downman & Green and Samuel J. Ritchie, and move the court to set aside the judgement entered in these causes on the 31st of Oct., 1887, dismissing the petitions and grant new trials, and in support of this motion assign the following grounds:

1. Error in finding an overpayment of two thousand eight hundred and fifty dollars and fifty-two cents ($2,850.52) under contract No. 243, in

finding 4, when the set-off of that amount was not claimed by the District of Columbia in any of the set-offs filed by them until after the case has gone to trial, and when there was no opportunity whatever to reply to the set-offs so claimed.

2. Error in all the remaining items of set-off allowed under the head of said contract No. 243, because the court specifically finds as fact that said items of work were all done after the suspension and resumption of work under said contract No. 243, and that two of the same were done after the date of extension of said contract 243, which extension in terms provided for board rates, and that therefore said board rates were not in conflict with or excessive of contract rates, but were actually contract rates.

3. Error of fact in this: That in the 9th of fact this court found as a matter of fact that 11,100 cubic yards of grading was done on two
41 blocks named in contract No. 690, and that 32,193 in said contract No. 690, whereas, in fact, the evidence shows that a certain amount of grading was done on said five blocks, but fails to show in any manner how much grading was done on the two blocks covered by said contract, and how much on the three blocks not covered by said contract, and there is no evidence on that point in the record.

4. Because the court erroneously credited the District of Columbia with two thousand three hundred dollars and fifty-one cents ($2,300.51), alleged overpayment on said contract 690, whereas the evidence shows no overpayment whatever on said contract.

5. Error of law in giving the District of Columbia the benefit of all the payments made by the board of public works, or the auditor of the District of Columbia, as if the same had been made in cash, whereas the evidence shows, and it should have been so found by the court, that all payments were made in depreciated certificates not worth over fifty cents on the dollar, and credit should therefore have been given for them at no greater rate.

6. Error of fact in this: That the court failed to find as a fact that all the work done under the Commissioners of the District of Columbia was done at board rates, and that from 1874 to 1876 said Commissioners paid such board rates for said work, and that all resumptions of contracts under said Commissioners were made with the understanding and agreement that board rates should be paid.

7. Error of fact in this: That in the 15th finding it is stated that it did not appear, except by the testimony of Green, taken after the death of Connolly, that their advances exceeded receipts in the sum of $8,700, whereas, in fact, it did so appear (in addition to Green's testimony) by an
anthenticated record from the S. C. of the District (see auditor's
42 report S. C. D. C., in case No. ——), and referred in 7th request in Ritchie's case.

8. Because of other errors of fact and law, which will be specified and set forth more fully and particularly on the argument of this motion.

9. Upon the ground of newly discovered evidence.

10. Error of law in that the defendant was allowed, after the case was called for trial (and an application by the claimants after for a continuance thereupon), to file and largely increased counterclaims, and the claimant forced to immediate trial upon the issues that instantaneously made up. See clerk's record.

11. And the claimants furthermore to be allowed to file additional detailed requests for findings and causes for new trial before the motion above is fully disposed of.

(Indorsed:) No. 280 & 150. Downman & Green vs. Dist. of Col. (Ritchie.) Motion for new trial & add'l findings. D. & S. & W.

43 COLUMBUS J. ESLIN, ADMR., *vs.* THE DISTRICT OF COLUMBIA. } No. 375. Consolidated with Nos. 150 (Par. X), 162, and 280.

Motion for new trial.—Filed November 19, 1887.

Now comes the claimant, Columbus J. Eslin, administrator, and moves the court to set aside the judgment entered in this cause on the 31st of October, 1887, dismissing the petition, and grant a new trial, and in support of this motion assigns the following grounds:

1. Error in finding an overpayment of two thousand eight hundred and fifty dollars and fifty-two cents ($2,850.52) under contract No. 243, in Finding 4, when the set-off of that amount was not claimed by the District of Columbia in any of the set-offs filed by it until after the case had gone to trial, and when there was no opportunity whatever to reply to the set-offs so claimed, and because the amount of $39,175.36, of which said item formed a part, was paid to David A. Connolly by the District of Columbia and received by him in full settlement and satisfaction of a disputed claim which had been the subject of controversy.

2. Error of fact in this: That in the fourth finding of fact, the court found that the said sum of two thousand eight hundred and fifty dollars and fifty-two cents ($2,850.52) was paid through the board of audit, whereas the payment was made through the board of public works in December, 1873, before the existence of said board of audit.

3. Error in all the remaining items of set-off allowed under the head of said contract No. 243, because the court specifically finds as a fact that said items of work were all done after the suspension and resumption of work under said contract No. 243, and that two of the same were done after the day of extension of said contract No. 243, which extension in terms provided for board rates, and that therefore said board rates were not in conflict with or excessive of contract rates, but were actually contract rates.

4. Error of fact in this: That in the ninth finding of fact this court found as a matter of fact that eleven thousand one hundred (11,100) cubic yards of grading were done on two blocks named in contract No. 690, and that thirty-two thousand one hundred and ninety-three (32,193) cubic yards of grading were done on three other blocks not mentioned in said contract No. 690, whereas, in fact, the evidence only shows that a certain amount of grading was done on said five blocks, but fails to show in any manner how much grading was done on the two blocks covered by said contract, and how much on the three blocks not covered by said contract, and there is no evidence on that point in the record.

5. Because the court erroneously credited the District of Columbia with two thousand three hundred dollars and fifty-one cents ($2,300.51) alleged overpayment on said contract No. 690, whereas the evidence shows no overpayment whatever on said contract.

6. Error of law in giving the District of Columbia the benefit of all the payments made by the board of public works or the auditor of the District of Columbia as if the same had been made in cash, whereas the evidence shows, and it should have been so found by the court,
44 that all the payments were made in depreciated certificates not worth over fifty cents on the dollar, and credit should therefore have been given for them at no greater rate.

7. Error of fact in this: That the court failed to find as a fact, that all the work done under the Commissioners of the District of Columbia was done at board rates, and that from 1874 to 1876 said Commissioners paid such board rates for said work, and that all resumptions of contracts under said Commissioners were made with the understanding and agreement that board rates should be paid.

8. Error of fact in this: That the court found that the alleged overpayments were made to Connolly, whereas it appears by the evidence that they were in great part made to one J. C. Lay, signing himself as attorney for Daniel A. Connolly, and there is no evidence to show that Lay was Connolly's attorney, or that Connolly ever received the benefit of any of said overpayments.

9. Error of fact in this: That the court found (finding IX) that Connolly agreed to do certain work on First street east, between East Capitol street and B street north, under contract 690, whereas it appears that the contract clerk had been directed on August 25, 1873, to cancel so much of said contract as relates to said street. (See original letter in the files, of which an imperfect copy omitting the word "cancel" is printed on page 73 of the Galt record.)

10. Error of fact in this: That the court found the following as fact: "But by the testimony of Green, taken after the death of Connolly, it appears that Downman & Green made advances amounting in all to upwards of $58,000, and that in February, 1876, their advances exceeded receipts in the sum of about $8,700."
45 Whereas the evidence of Green is merely that "to the best of his recollection" it was $8,700, and he admits that there was a dispute about it, while Connolly in his revocations claims that nothing whatever is due, and no books or other papers were produced to show the fact claimed, and for these reasons no finding on the subject is warranted by the evidence.

11. Error of law in this: That the court has found as facts certain instruments set forth in finding XV (the first, third, and fourth instruments) when these have not been proved by the attesting witnesses.

12. Error of fact in this: That the court found the instruments aforesaid in an incomplete state, viz, without the names of the attesting witnesses.

13. Surprise in this: That the defendant, prior to the day of trial, filed exceptions to the referee's report, but no plea of counter-claim or set-off, and no opportunity was given to this claimant to file a replication, although he is able fully to file a valid replication, to wit, that of no assets in his possession as administrator; by reason whereof this claimant has suffered in that a judgment has been rendered against him for six hundred and fifty-eight dollars and five cents ($658.05).

14. Error of law in this: That the judgement of this court has been entered that defendant have judgment for the sum of six hundred and

fifty-eight dollars and five cents ($658.05) against Columbus J. Eslin, as administrator of Daniel A. Connolly; whereas judgment should have been rendered against Columbus J. Eslin, administrator of Daniel A. Connolly, *de bonis testatoris.*

15. Because of other errors of law and fact which will be specified and set forth more fully and particularly on the argument of this motion.

16. Upon the ground of newly discovered evidence.

CHARLES & WILLIAM B. KING,
Attorneys for Claimant.

46 WILLIAM M. GALT *vs.* THE DISTRICT OF COLUMBIA. } No's. 162, 375. Consolidated with Nos. 150 (Par. X) and 280.

Motion for new trial.—Filed November 19, 1887.

Now comes the claimant, William M. Galt, and moves the court to set aside the judgment entered in this cause on the 31st of October, 1887, dismissing the petition, and grant a new trial, and in support of this motion assigns the following grounds:

1. Error in finding an overpayment of two thousand eight hundred and fifty dollars and fifty-two cents ($2,850.52) under contract No. 243, in Finding 4, when the set-off of that amount was not claimed by the District of Columbia in any of the set-offs filed by it until after the case had gone to trial, and when there was no opportunity whatever to reply to the set-offs so claimed, and because the amount of $39,175.36, of which said item formed a part, was paid to David A. Connolly by the District of Columbia and received by him in full settlement and satisfaction of a disputed claim which had been the subject of controversy.

2. Error of fact in this: That in the fourth finding of fact the court found that the said sum of two thousand eight hundred and fifty dollars and fifty-two cents ($2,850.52) was paid through the board of audit, whereas the payment was made through the board of public works in December, 1873, before the existence of said board of audit.

3. Error in all the remaining items of set-off allowed under the head of said contract No. 243, because the court specifically finds as a fact that said items of work were all done after the suspension and resumption of work under said contract No. 243, and that two of the same were done after the day of extension of said contract No. 243, which extension, in terms, provided for board rates, and that therefore said board rates were not in conflict with or excessive of contract rates, but were actually contract rates.

4. Error of fact, in this: That in the ninth finding of fact this court found as a matter of fact that eleven thousand one hundred (11,100) cubic yards of grading were done on two blocks named in contract No. 690, and that thirty-two thousand one hundred and ninety-three (32,193) cubic yards of grading were done on three other blocks not mentioned in said contract No. 690, whereas, in fact, the evidence only shows that a certain amount of grading was done on said five blocks, but fails to show in any manner how much grading was done on the two blocks covered by said contract, and how much on the three blocks not covered by said contract, and there is no evidence on that point in the record.

5. Because the court erroneously credited the District of Columbia with two thousand three hundred dollars and fifty-one cents ($2,300.51) alleged overpayment on said contract No. 690, whereas the evidence shows no overpayment whatever on said contract.

6. Error of law in giving the District of Columbia the benefit of all the payments made by the board of public works or the Auditor of the District of Columbia as if the same had been made in cash, whereas the evidence shows, and it should have been so found by the court,
47 that all the payments were made in depreciated certificates not worth over fifty cents on the dollar, and credit should therefore have been given for them at no greater rate.

7. Error of fact, in this: That the court failed to find as a fact that all the work done under the Commissioners of the District of Columbia was done at board rates, and that from 1874 to 1876 said Commissioners paid board rates for said work, and that all resumptions of contracts under said commissioners were made with the understanding and agreement that board rates should be paid.

8. Error of fact, in this: That the court found that the alleged overpayments were made to Connolly, whereas it appears by the evidence that they were in great part made to one J. C. Lay, signing himself as attorney for Daniel A. Connolly, and there is no evidence to show that Lay was Connolly's attorney, or that Connolly ever received the benefit of any of said overpayments.

9. Error of fact, in this: That the court found (Finding IX) that Connolly agreed to do certain work on First street east, between East Capitol street and B street north, under contract 690, whereas it appears that the contract clerk had been directed on August 25, 1873, to cancel so much of said contract as relates to said street. (See original letter in the files, of which an imperfect copy omitting the word "cancel" is printed on page 73 of the Galt record.)

10. Error of fact, in this: That the court found the following as fact: "But by the testimony of Green, taken after the death of Connolly, it appears that Downman & Green made advances amounting in all to upwards of $58,000, and that in February, 1876, their advances exceeded receipts in the sum of about $8,700."
48 whereas the evidence of Green is merely that "to the best of his recollection" it was $8,700, and he admits that there was a dispute about it, while Connolly in his revocations claims that nothing whatever is due, and no books or other papers were produced to show the fact claimed, and for these reasons no finding on the subject is warranted by the evidence.

11. Error of law, in this: That the court has found as facts certain instruments set forth in finding XV (the first, third, and fourth instruments) when these have not been proved by the attesting witnesses.

12. Error of fact, in this: That the court found the instruments aforesaid in an incomplete state, viz, without the names of the attesting witnesses.

13. Surprise, in this: That the defendant, prior to the day of trial, filed exceptions to the referee's report, but no plea of counterclaim or set-off, and no opportunity was given to this claimant to file a replication, although he is able fully to file a valid replication, to wit: That of

no assets in his possession as administrator; by reason whereof this claimant has suffered, in that a judgment has been rendered against him for six hundred and fifty-eight dollars and five cents ($658.05).

14. Because of other errors of law and fact which will be specified and set forth more fully and particularly on the argument of this motion.

15. Upon the ground of newly discovered evidence.

GEORGE A. KING,
Attorney for Claimant.

49 *In No. 162, D. C.*

On motion suggesting death *death* of William M. Galt, and to substitute his executrix, it was ordered that this suit be revived in the name of Harriet T. Galt, executrix of William M. Galt, deceased.

BY THE COURT.

November 7, 1889.

Order allowing motions for new trial.

NOVEMBER 13, 1893.

COLUMBUS J. ESLIN, ADMR. OF DANIEL A. Connolly, dec'd, *vs.* DISTRICT OF COLUMBIA.	No. 375.
OSCEOLA C. GREEN, SURVIVING PARTNER of Downman and Greene, *vs.* DISTRICT OF COLUMBIA.	No. 280.
HARRIET T. GALT, EXECUTRIX OF William M. Galt, dec'd, *v.* DISTRICT OF COLUMBIA.	No. 162.
SAMUEL J. RITCHIE *v.* DISTRICT OF COLUMBIA.	No. 150.

Ordered, That the motions of the claimants for new trials in these cases be allowed under the terms of an order of the court this day filed, which order provides: "As to the allegations made by way of counter-claim the affirmative is upon the defendants. Leave is given both parties to take further testimony, which shall be closed January 31, and the cases shall be put upon the February trial calendar."

BY THE COURT.

Nov. 13, 1893.

50 COLUMBUS J. ESLIN, ADMINISTRATOR OF Daniel A. Connolly, deceased, v. THE DISTRICT OF COLUMBIA. } 375.

OSCEOLA C. GREEN, SURVIVING PARTNER OF Downman & Green, v. THE DISTRICT OF COLUMBIA. } 280.

HARRIET T. GALT, EXRX. OF WILLIAM M. GALT, v. THE DISTRICT OF COLUMBIA. } 162.

SAMUEL J. RITCHIE v. THE DISTRICT OF COLUMBIA. } 150.

(Decided May 28, 1894.)

Findings of fact and opinion by Judge Davis.

These cases having been consolidated and heard together, the court, from the evidence, find the facts to be as follows:

I.

During the years 1872, 1873, 1874, and 1875 Daniel A. Connolly had a large number of written contracts with the District of Columbia for the improvement of the streets of Washington, made and signed as required by the act of February 21, 1871, chapter 62, section 537 (16 Stat. L., 427). His administrator now sues to recover balances alleged to be due on eleven of these contracts, with their extensions.

The claims in the other three above-entitled cases are based upon assignments from said Connolly.

II.

There is no controversy about contracts Nos. 209, 231, and 1035. It is admitted, and the court so finds, that the amounts claimed are due thereon—in all, $244.18.

On contracts Nos. 209 and 231 the last payments were made April 7, 1873, and on No. 1035, August 1, 1874. None of the work was done after these respective dates.

III.

At different times the board of public works prescribed scales of prices for contracts for the various kinds of work to be done. Upon the subject of grading the following entries are found upon their journal:

"SEPT. 14, 1871.—The following scale of prices for work and material was adopted:

* * * * * * *

"Grading per cubic yard, earth to be deposited where directed without extra charge, 20 cents.

"SEPTEMBER 26, 1871.—Resolved, That in fixing the price of grading at the rate of 20 cents a cubic yard, the board did not intend that it should apply to old gravelled streets ordered to be cut down; but will allow 40 cents for all such grading for the depth of 2 feet below the surface; and that the chief of the bureau of contracts be notified of this action.

51 JAN'Y 22, 1872.

"Ordered, That the prices of grading be fixed from and after this date at 30 cents per cubic yard, including the hauling, not to exceed two hundred (200) feet; for each additional two hundred (200) feet 1 cent additional per cubic yard will be allowed.

"WASHINGTON, *July 17, 1872.*

"R. C. PHILLIPS, Esq., *Ch'f Eng'r.*

"SIR: You are hereby informed that inasmuch as frequent applications are being made to the board for the allowance of the advanced rates for work done previous to such increase, it is their desire and intention to adhere strictly to the old rates applicable to contracts made prior to the increase of prices, and allow the latter only on contracts since awarded.

"By order of the board.

"CHAS. S. JOHNSON,
"*Asst. Secretary.*

"JULY 15, 1873.—Auditor was notified that the price for hauling earth has been established at 1¼ cents per cubic yard for every 100 feet of haul over first 200 feet since June 1, 1873. Contract clerk so notified.

"WASHINGTON, D. C., *September 23, 1873.*

"GENTLEMEN: In making our assessments on certain streets where final measurements are made, but no settlement had with the contractor, I find that the item of 'Haul, so many feet over 200 feet' gives constant rise to questions with the contractor as to the amount allowed therefor. At present it stands at 1¼ cents per yard for every yard hauled 100 feet over 200 feet for all work done since June 1, 1873. Yet the board, in a few instances, have granted the 1¼ cents for work done prior to that date, and all contractors claim the same amount, 'in view,' as they say, 'of the fact that they have to stand a discount of 20 per cent' on their paper. I think all this could be satisfactorily arranged by allowing 1¼ cents for all open accounts—that is, where final and absolute settlements have not been made. I respectfully suggest this in order that assessments may be complete and agree with the final bill as settled with the contractor.

"Very respectfully,

"J. C. LAY,
"*Auditor Board of Public Works.*

"The BOARD OF PUBLIC WORKS.

"SEPTEMBER 27, 1873.—J. C. Lay, auditor, was notified that in settlements of accounts for extra haul, that 1¼ cents per cubic yard for each additional 100 feet beyond the first 200 feet for all work done since January 1, 1873, will be allowed.

"BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
"*Washington, September 27, 1873.*

"SIR: I am directed by the board to notify you that in the settlement of accounts for extra haul, that 1¼ cents per cubic yard for each additional 100 feet beyond the first 200 feet for all work done since January 1, 1873, will be allowed.

"Very respectfully,

"EDWARD JOHNSON,
"*Assistant Secretary.*

"J. C. LAY, Esq., *Auditor, etc.*"

IV.

CONTRACT NO. 243 AND EXTENSIONS.

"This contract, made and concluded this twenty-fourth day of April, in the year one thousand eight hundred and seventy-two, by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and S. B. Brown, constituting and composing the board of public works of the District of Columbia, of the first part, and Daniel A. Connolly, of Washington, D. C., of the second part, witnesseth: First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed,
52 to furnish at his own proper cost and expense all the necessary materials and labor, and, in a good, firm, and substantial manner, to grade Massachusetts avenue, from New Jersey avenue to Lincoln square, in the city of Washington, D. C., said grading to be executed in every respect in conformity with the specifications following, to wit:

"SPECIFICATIONS GRADING STREETS, ETC.

"The base of excavation, including the sidewalks, will be feet wide. The roadbed proper will be feet between the curbs, and must be graded to ( ) inches below the level of the curb at the centre of the street, and ( ) inches below the level of the curb at the side, leaving the roadbed a fall of inches from the centre to the sides.

"The material obtained in grading will be deposited where directed by the chief engineer of the board of public works; and no sand, gravel, cobblestones, curb, bricks, or pipe obtained in the excavation, or found on the premises, shall be considered the property of the party of the second part, nor used by him or them, except as hereinafter prescribed.

"The filling must be done in layers not exceeding 18 inches in thickness, so that the same may be well compressed by the driving of the carts over it.

"The excavations will include only the roadbed, sidewalks, and the slope from them to the building line, according to the grade to be given by the chief engineer of the board of public works. No more grading must be commenced at any one time than 1 square, except by permission

of the chief engineer; and the filling must be brought up to grade established and shown by plans before the work can be accepted as completed.

"In the allowance for hauling, the length of the haul over 200 feet and the amount of material hauled will be determined on an average basis by the chief engineer of the board of public works, whose decision shall be final. All materials, such as curb, cobble, brick, etc., removed from the premises, and deposited under the directions of the chief engineer, will be paid for at the rates for hauling established by the board of public works.

"All measurements will be made in the excavation only.

"Second. It is further agreed that the said party of the first part shall appoint, from time to time, such persons or person as may be by said party deemed proper, to inspect the material to be furnished, and the work to be done under this contract, and that such persons or person shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

"Third. It is further agreed that the work under this contract shall be commenced on or before the 29th day of April, in the year 1872.

"Fourth. It is further agreed that the said party of the first part may, on notice to the party of the second part, suspend work under this contract; but if not suspended, it shall be completed within ninety days from the date fixed for its commencement, and that the said work shall not be sublet without the consent in writing of the said party of the first part.

"Fifth. It is further agreed that if, at any time, the party of the first part shall be of opinion that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is willfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, all of the work may be discontinued under this contract, or any part thereof, and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as may be found upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the party of the second part, and the expense so charged shall be deducted and paid by the party of the first part out of such moneys as may be then due, or may at any time thereafter grow due to the said party of the second part, under and by virtue of this agreement, or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the party of the second part shall be entitled to receive the difference, and in case such expense shall exceed the last said sum the amount of such excess shall be paid to the party of the first part by the party of the second part.

"Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor.

"Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract, in cash current, and not in what is denomi-
53 inated store pay or orders; and that he will from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And if such evidence is not furnished, such sum or sums as may be necessary for such payment or claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

"Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the board of public works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part completely performed this contract on his part, and shall submit with said certificate his estimate of the amount due the party of the second part, then within thirty days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made, as hereinafter mentioned. And it is further expressly agreed that no money shall become due and payable under this contract, except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work, except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract. Provided, that partial payments may be made under direction of the board, otherwise than upon the estimates of the engineer, as provided above, if in the opinion of the board the vigorous prosecution of the work will be promoted thereby.

"Ninth. It is further agreed that if at any time during the period of one year from the completion of the work to be done under this contract any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the party of the first part; and in case of a failure or neglect of the said party of the second part so to do, the same shall be done under the directions and orders of the party of the first part, at the cost and expense of the party of the second part.

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit: Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not

exceeding two hundred (200) feet, and one cent additional per cubic yard for every two hundred (200) beyond the above, which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.

"Eleventh. It is further agreed that the measurements shall be made by the engineer of the board or his assistants.

"Twelfth. And the said party constituting and composing the board of public works in and for the District of Columbia aforesaid agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due him according to the contract.

"Thirteenth. It is further agreed that this contract shall be subject to any and all provisions of an act entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto, or to any part thereof, as fully as if the same were particularly set forth herein.

"In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written."

[Signed by the parties.]

After a large amount of work had been done under this contract, and several partial measurements and payments made, the work was suspended by the board of public works under article 4 of the contract.

After the appointment of Commissioners under the act of June 20, 1874, at the request of Connolly work was resumed under this contract, and partial measurements and payments from time to time were made thereon.

54 In making payments on four of these measurements the "haul" was computed at the rate of 1¼ cents for each 100 feet over 200 feet instead of 1 cent for each 200 feet over the first 200 feet as provided in the contract. These four items of computations are shown below.

A referee appointed by this court in these cases thus reported:

"A controversy having arisen between Connolly and the board of public works in respect of the amount of work done under the original contract No. 243, the matter was referred, on November 20, 1873, for adjudication to a commission consisting of S. T. G. Morsell, Thomas M. Plowman, Joseph F. Collins, and W. P. Bell, and a settlement of the account under said original contract was made in accordance with the award of said commission, as reported by that body to the board of public works November 27, 1873."

There is no sufficient evidence to support this statement of the referee.

(1) December 5, 1873.—38,-07 cubic yards of earth hauled 1,000 feet over 200 feet, computed at 1¼ instead of one-half cent for each 100 feet beyond 200 feet, making an excess of..... $2, 850. 52

(2) July 7, 1875.—26,083.43 cubic yards haul, 1,250 feet over 200 feet allowed at 1¼ cents per 100 feet, in lieu of contract rate of 1 cent per 200 feet. Excess on above... 2, 445. 32

(3) July 27, 1875.—20,875.46 cubic yards haul, 1,717 feet over 200 feet allowed at 1¼ cents per 400 feet, in lieu of contract rate of 1 cent per 200 feet. Excess on above... $2,687.71

(4) February 2, 1876.—5,740 cubic yards haul, 1,000 feet over 200 feet allowed at 1¼ cents per 100 feet, in lieu of contract rate of 1 cent per 200 feet. Excess..... 430.00

Total alleged overpayments..... 8,413.55

The work in items 2, 3, and 4 was done after the resumption, and in 3 and 4 after May 4, 1875.

These computations were made by the District auditor or engineer, and paid through the board of audit.

In this calculation all the work done under the two extensions, and on Fifth street northeast, between D and H, as shown in Finding V, is credited to Connolly. Owing to alleged assignments it is separately calculated in Finding V.

If the alleged overpayments are credited to the defendant there will still be due the claimant on this contract $936.40; if not so credited, $9,349.95 will be due.

The above payments were made through "the board of public works."

V.

FIRST EXTENSION OF CONTRACT NO. 243.

May 4, 1875, the parties entered into the following contracts:

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Daniel A. Connolly that contract No. 243, in the series of contracts made by the board of public works of the District of Columbia, be and the same is hereby extended, with its various terms, conditions, and stipulations, to embrace the following work, viz:

"Grade upon the following streets, between the points named:

"B st. south, between 4th st. east and Boundary;

"C st. north, between 4th st. east and Boundary;

"A st. south, between 3d st. east and Boundary;

"D st. north, between 1st and 4th st. east;

"Delaware ave., between C st. north and Boundary;

"E st. north, between 2nd and New Jersey ave.;

"6th st. east, between Mass. ave. and East Capitol st.;

"1st st. east, between C st. north and Boundary;

55 "or upon such and so many of these streets as the engineer of the District of Columbia shall determine. It is understood that the work herein described is in lieu of similar work relinquished on Massachusetts avenue, and the engineer aforesaid shall determine what amount of grading will be a just equivalent for work relinquished on said Massachusetts avenue, as contemplated by this agreement. And the said Daniel A. Connolly shall, under the direction of the engineer aforesaid, replace the old material on said streets—that is to say, reset the curbs and relay the brick foot pavements where necessary, according to specifications hereunto annexed.

"It is further agreed that the said Daniel A. Connolly shall receive the prices established and paid by the board of public works for work of similar character, provided that payment shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

"In witness whereof the said District of Columbia has caused this instrument to be signed by the Commissioners of said District, appointed under the act of Congress entitled "An act for the government of the District of Columbia, and for other purposes," approved June 20, 1874, and the common seal of said District to be hereto affixed, and the party of the second part to these presents has hereunto set his hand and seal."

[Signed by the parties.]

SECOND EXTENSION OF CONTRACT NO. 243.

October 6, 1875, the parties entered into the following contract:

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Daniel A. Connolly that contract No. 243, in the series of contracts made by the board of public works of the District of Columbia, be and the same is hereby extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit: Relay the old material on Massachusetts avenue, between New Jersey avenue and Lincoln square, wherever directed by the engineer of the District of Columbia.

"It is further agreed that the work herein specified shall be completed by the first day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Daniel A. Connolly shall receive the prices established and paid by the board of public works for work of similar character, provided that payment be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value."

All the work contracted for by these two extensions was performed, proper measurements thereof made, pay computed according to stipulations of the contracts, and payments made thereon. The computations and payments are embraced in the statement of accounts under contract No. 243, whereby the balance of $9,349.95, upon which claimant sues, is made to appear.

Said Connolly, in mistake as to the extent of the two extension contracts, did certain work on Fifth street, between D and H streets northeast, not stated in the contracts. This work was computed at the rates named in the two extensions, and amounted to $2,327.91.

As a precaution against conflicting claims, said Connolly, at the suggestion of the defendant, procured from one William Hussey, in whose contract this work was supposed to be included, an assignment dated July 31, 1876, of his interest therein, and on the same day assigned $2,327 thereof to William A. Galt, the claimant in case No. 162, upon which assignment the said Galt bases his claim in said case. Both of these assignments are set forth in Finding XVII.

If the said Galt or other assignees are entitled to claim the $2,327 so assigned, the same should be deducted from any sum that may
56 otherwise be found in favor of the claimant, Eslin, it having been credited to him in the accounts under contract No. 243, from which arises the alleged balance of $9,349.95.

The last payment on contract No. 243 and extensions was made January 1, 1876, and all work under them was done prior to that date.

VI.

CONTRACT NO. 349.

This contract is dated June 24, 1872, and, except as to the work to be done, is like contract No. 243 in Finding IV:

"Grading, 30 cents per cubic yard, including a haul of 200 feet, and one (1) cent additional per cubic yard for every 200 feet of haul beyond the first two hundred feet."

A final measurement of the work done under this contract was made December 2, 1874. Three items of the work were computed by the District auditor or engineer, at the following prices:

(1) 2,250½ cubic yards grading, computed at 40 cents a cubic yard instead of 30 cents, as provided in the contract, making an excess of	$225.05
(2) Haul on said 2,250½ cubic yards, 2,800 feet over 200 feet, computed 1¼ cents a cubic yard for every 100 feet over 200 feet, instead of 1 cent for every 200 feet, as provided in the contract, making an excess of	474.00
(3) Haul of 1,406 cubic yards, 800 feet over 200 feet, computed as in item 2, making an excess over contract rate of	84.00
Total excess of the three items	783.05

Other grading and haul, appearing upon the same vouchers, are computed at the contract rate.

February 2, 1875, these several bills were paid through the board of audit.

If these alleged overpayments are credited to the defendant there will still be due the claimant $2.51. If not so credited there will be due him $785.56, the amount claimed. Last payment made December 1, 1874.

VII.

CONTRACTS NOS. 595 AND 1057½.

Contract No. 595 is dated November 12, 1872, and provides for certain work on A street south. Prices stated for grading, 30 cents per cubic yard, to include the first 200 feet of haul, and 1¼ cents per cubic yard for each additional 100 feet of haul beyond the first 200 feet.

Contract No. 1057½ is dated April 8, 1874, and provides for certain work on A street southeast. It is drawn on a printed blank and the blanks for prices are not filled in.

The work was done under these two contracts, and, as computed by the District auditor or engineer and the board of audit, amounted to $9,911.93. The payments made amount to $9,845.93, leaving a balance due claimant of $66.65, the amount claimed in the petition.

In making the computations by which the above amount is found due, 2,400 cubic yards of grading, done under contract No. 595, is
57 reckoned at 40 cents a cubic yard instead of 30 cents, as provided in the contract, making an excess of $240, which sum was paid February 9, 1875, through the board of audit.

In the same voucher, 5,003 cubic yards grading is reckoned at 30 cents a cubic yard, as provided in the contract.

If this excess were credited to the defendant, the claimant would be overpaid $173.35; if not so credited, the balance in favor of the claimant is $66.65.

The last payment on contract No. 595 was made August 1, 1874.

VIII.

CONTRACT NO. 665.

Under this contract dated April 22, 1873, the contractor agreed to perform certain work on B street north, between Second and Fourth streets east. Article 10 of said contract stipulated that he should receive the sum of 30 cents per cubic yard for grading, to include 200 feet of haul and 1 cent additional for every 200 feet hauled beyond the first 200 feet.

A final measurement for this work was made for Connolly by Assistant Engineer Bodfish, dated December, 1874. In voucher based on said measurement the contractor is allowed 1¼ cents per cubic yard for every 100 feet of haul beyond the first 200 feet, in lieu of contract rate of one-half cent.

The amount is as follows:

"February 9, 1875, 9,874 cubic yards haul, 2,124 feet over 200 feet allowed 1¼ cents per 100 feet in lieu of contract rate, 1 cent per 200 feet. Excess, $1,568.62."

This sum was paid through the board of audit, February 9, 1875.

If this alleged overpayment were credited to the defendant, the claimant would be overpaid on this contract $1,012.37; if not so credited, there is still due the claimant the sum of $556.25, as claimed in the second amended petition.

IX.

CONTRACT NO. 690.

May 20, 1873, the contract clerk was ordered by the board of public works to prepare a contract with Daniel A. Connolly for grading, setting curb, and laying the sidewalks on B street north, from Delaware avenue to First street east, and on First street east, from B street north to B street south, work to be completed in thirty working days, and the dirt to be deposited in the reservation at foot of Capitol.

A contract was prepared, and, although bearing date as of May 20, 1873, appears not to have been executed until November, 1873, as the records of the board of public works show that several amendments and modifications of said contract were ordered to be made between May and November, 1878, the last amendment ordered being November 1, 1873, all of which appear in the body of the contract as of May 20, 1873.

58 By this contract Connolly agreed to grade, set the curbstones, and lay and put down the brick foot pavements on B street north, from Delaware avenue to Second street east; also to grade the carriageway, set the curbstones, and lay and put down the brick foot pavements on First street east, between East Capitol street and B street north; also to grade the sidewalks on the east side of First street east, between A and B streets north.

The prices to be paid for doing the work embraced in this contract (article 10) are as follows:

Grading, 30 cents per cubic yard, to include the first 200 feet of haul, and 1 cent additional per cubic yard for every additional 200 feet of haul beyond the first 200 feet for B street, and 40 cents per cubic yard for First street, conditions as to haul the same as on B street. For laying brick foot pavements and setting curbstone the rates are the same as those specified in other contracts in this cause.

It will be observed that the order to draw the contract embraced work on First street east, from B street north to B street south, but as drawn only embraced work on First street east, from East Capitol street to B street north, covering two blocks only. The work was, in fact, done from C street north to B street south, covering five blocks.

Under what arrangements this additional work was done does not appear.

A final measurement of all this work was made December 27, 1873, by Assistant Engineer Charles E. Barney.

According to this measurement, which is undisputed, 11,100 cubic yards of grading was done on the two blocks named in the contract and hauled 2,800 feet over the first 200 feet. The price of the extra haul was reckoned and paid at the rate of 1¼ cents a cubic yard for each 100 feet, making an excess over the contract rate of $2,331.

On the three blocks not named in the contract, but measured and paid on the same vouchers, the amount of grading done was 32,193 cubic yards and the extra haul 2,800 feet. The price of extra haul was reckoned at 1¼ cents for each 100 feet, which was the board rate, making an excess over the rate prescribed in the contract for the other two blocks of $6,760.53. If the District should be credited with both these alleged overpayments, Connolly has been overpaid in the sum of $9,091.53 less $30.49=$9,061.04. If credited with the smaller sum only, Connolly has been overpaid $2,331 less $30.49=$2,300.51. If credited with neither, there is due the claimant $30.49.

These alleged overpayments were made December 31, 1873. The last payment on the contract was made June 1, 1875.

These computations were made by the District auditor or engineer.

X.

CONTRACT NO. 828.

This contract was made August 8, 1874. The work amounted to $1,159.56, of which $300.04 remains due and unpaid.

59

XI.

CONTRACT NO. 1028.

By this contract, made January 30, 1874, the claimant agreed to do certain grading on G street north and Second street east. Relative to payment, the contract contains the following provision:

"Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one (1) cent per cubic yard for every additional two hundred (200) feet of hauling beyond the first two hundred feet.

"Grading of old graveled streets for first feet, per cubic yard, cents."

June 2, 1874, there was a partial measurement of the work made by the District engineer, and upon it the price of grading is calculated at 40 instead of 30 cents a cubic yard on 3,000 cubic yards, making a difference of $300. If this alleged overpayment is credited to the defendant, there will still be due to the claimant $1,645.09. If not so credited, there is due him $1,945.09. This $300 was paid through the board of audit. Last payment made January 1, 1876.

XII.—*Counterclaim.*

CONTRACT NO. 447.

This contract is dated July 12, 1872, and provides for certain grading to be done on Third street east, between Maryland avenue and H street north. The contract provides the following prices:

Grading, 30 cents per cubic yard, to include the first 200 feet of hauling, and 1 cent per cubic yard for every additional 200 feet of hauling.

September 20, 1872, Connolly applied for a measurement of the grading done by him on Third street northeast, from Maryland avenue to F street, and thereupon a measurement of the same was made by Wm. Forsyth, assistant engineer, showing the amount of grading done to October 5, 1872, to have been 17,325 cubic yards, which amount was audited by the auditor of the board of public works at the contract rate, 30 cents per yard, making $5,197.50, for which certificates were issued to Connolly and the account closed on the 7th day of April, 1873.

This account was afterwards opened by the board of audit, upon a sworn statement made by Connolly, on the 2d day of November, 1875, that the 17,325 cubic yards had been hauled a distance of 1,700 feet. Assuming this statement to be correct, he was entitled, according to the terms of the contract, to claim $1,299.38 additional compensation. The board of audit, however, reckoned the haul at 1¼ cents for every 100 feet, making the amount $3,681.56, making an excess over contract rates of $2,382.18.

This sum of $3,681.56 was paid to Albert Gleason, assignee of Connolly.

CONTRACT NO. 527.

This contract, dated September 13, 1872, provided for certain work on several streets. Prices fixed as follows:

Grading, 30 cents per cubic yard, to include the first 200 feet of hauling, and 1 cent per cubic yard for every additional 200 feet of hauling.

60 The amount of work done under this contract, as reported by the engineers of the board of public works, is as follows:

E street, 7,327 cubic yards grading, at 30 cents per yard..	$2,198.10
Certificate of Wm. Forsyth, asst. engineer, October 5, 1872, with no allowance for hauling, Fourth street:	
7,999 cubic yards grading, at 30 cents	2,399.70
7,999 cubic yards haul 600 feet over 200 feet, at 30 cents.....	239.97
Making	4,837.77

Which amount was audited by the auditor of the board of public works and certificates issued to Connolly therefor. This account was opened by the board of audit under the same conditions as already stated under the head of contract No. 447, and a haul of 1,000 feet at 1¼ cents per 100 feet allowed on the work done on E street, making an additional allowance on 7,327 cubic yards, at 12½ cents per yard, equal to $915.87, which sum was paid A. Gleason under the assignment elsewhere referred to. If this excess is credited to the defendant, it will leave a balance of $622.79 in favor of the District.

CONTRACT NO. 693.

This contract is dated May 21, 1873, and provides for work on certain streets. The provision for payment is as follows:

"Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one (1) cent per cubic yard for every additional two hundred (200) feet of hauling beyond the first two hundred feet.

"Grading of old graveled streets, for first feet, per cubic yard, cents."

The work contracted for was completed and measured, computed, audited, and certificates given therefor under the board of public works. The computation was made at the rates provided for in the contract. Thus the account was closed.

These accounts were afterwards opened by the board of audit, and the following additional allowances made thereon, to wit:

Alley in square 575, 861 cubic yards, at 1¼ cents per 100 feet of haul in lieu of ½ cent per 100 feet, being in excess of contract price.....	$129.15
Third street northeast, 7,540 cubic yards, at 1¼ cents per 100 feet of haul in lieu of ½ cent per 100 feet, being in excess of contract price	904.80
Total additional allowance by board of audit.....	1,033.95

If this alleged overpayment is credited to the defendant the contract is overpaid in the sum of $1,033.95.

These three items of counterclaim amount to $5,062.02. All were paid to Albert Gleason, assignee of Connolly.

The case was once before a referee, who found the amounts of the counterclaim as above stated. No exception was taken in the court to the amount of the overpayments, but exception was taken to the allowance as a cou'terclaim, because they were paid, not to the claimant, but to Gleason.

These three items of counterclaim were paid to Gleason under the following assignment:

"For and in consideration of the sum of one dollar ($1.00) lawful money of the United States, the receipt whereof is hereby acknowledged, I hereby transfer and assign to Albert Gleason, of the
61 city of Washington, District of Columbia, all my right, title, and interest in and to any and all claims that may have been or may be presented to or allowed by the board of audit of the District of Columbia, arising under or out of any and all of my contracts with the late board of public works of the District of Columbia for work done by me prior to July 7, 1874, and I hereby make, constitute, and appoint, and by these presents do make, constitute, and appoint, the said Albert Gleason my true and lawful attorney, irrevocable, for me and in my name, place, and stead, hereby annulling and revoking all former powers of attorney or authorizations whatever in the premises, to collect, receipt for, and receive from the board of audit of said District all sums of money, certificates, or other evidences of indebtedness now due or that may become due me under or in connection with said contracts as above specified, and to from time to time furnish any further evidence necessary or that may be demanded; giving and granting to my said attorney full power and authority to do and perform in my name all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might do or could do if personally present at the doing thereof, with full power of substitution and revocation, and in my name to receipt and sign all vouchers, and endorse, transfer, and sell all my certificates, orders, and warrants; hereby ratifying and confirming all that my said attorney or his substitute may or shall lawfully do or cause to be done by virtue thereof.

"In witness whereof I hereunto set my hand and seal this 29th day of October, 1875.

"DANIEL A. CONNOLLY." [SEAL.]

[Witnessed and acknowledged.]

XIII.

It does not appear that said Gleason has ever claimed, under his assignment, any of the balances sued upon in this case, nor has the defendant set up the assignment as a defense.

It does not appear that Daniel A. Connolly, or his administrator, ever ratified the act of Albert Gleason in receiving overpayments on claims presented to the board of audit, or ever received any benefit therefrom.

XIV.

By contract No. 31, new series, between Daniel A. Connolly and the District of Columbia, dated June 19, 1876, it was among other things, agreed as follows:

"It is further agreed that in consideration of this contract the said Daniel A. Connolly will make no claim against the District of Columbia for damages on account of suspension of work, or for other cause, under any order for work, or any contract or agreement between the Commissioners of the District of Columbia and the said Daniel A. Connolly, heretofore existing between said parties and now cancelled, except for just settlement for work already completed."

XV.

APPLICABLE TO THE CASE OF DOWNMAN & GREEN, NO. 280.

"MEMORANDA OF AGREEMENT.

"It is hereby agreed between Rawleigh W. Downman and Osceola C. Green, both of the city of Washington, of the first part, and Daniel A. Connolly, of the second part, that, whereas the said party of the second part has executed a certain power of attorney, dated December, 1874, whereby the said parties of the first part are authorized to draw and receipt for money, bonds, or certificates due said party of the second part from the District of Columbia for work done or to be done under contract No. 243: Now, then, the party of the second part agrees that the said parties of the first part may sell or hypothecate so much of the bonds or certificates so drawn under said power of attorney as may be necessary to reimburse said parties of the first part for all moneys advanced by them and for all proper costs, charges, and commissions,
62 and upon the discharge of all such indebtedness the said parties of the first part hereby agree to return, surrender, and release said power of attorney and the residue, if any, of such bonds or securities to the said party of the second part.

"In testimony whereof the said parties of the first part and the said party of the second part have hereunto set their hands and seals this 1st day of December, 1874.

"DANIEL A. CONNOLLY. [SEAL.]
"OSCEOLA C. GREEN. [SEAL.]
"R. W. DOWNMAN. [SEAL.]

"POWER OF ATTORNEY.

"Know all men by these presents that I, Daniel A. Connolly, of Washington City, in the District of Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint R. W. Downman and Osceola C. Green, of Washington City, in the District of Columbia, my true and lawful attorney, for me, and in my name, place, and stead to demand, ask, sue for, collect, and receive all sums of money, bonds, or any other claims whatsoever which are due, owing, or payable to me from the District of Columbia, or any of the late governments or

authorities therein, arising from work done, to be done, on Massachusetts avenue under contract No. 243, between New Jersey avenue and Lincoln square; and for the purpose aforesaid I do hereby grant unto my said attorney full power and authority to do and perform all and every act whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof, hereby annulling and revoking all former powers of attorney or authorizations whatever in the premises.

"In witness whereof I have hereunto set my hand and seal the 5th day of December, in the year 1874.

"DANIEL A. CONNOLLY. [SEAL.]

"POWER OF ATTORNEY.

"Know all men by these presents that I, Daniel A. Connolly, of Washington City, in the District of Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Rawleigh W. Downman and Osceola C. Green, or either of them, my true and lawful attorneys, for me and in my name, place, and stead to collect, sue for, receive, and receipt for all monies or certificates of indebtedness now due or to become due to me by reason of work done for the District of Columbia on the streets named in letter from the engineer's office, of April 21st, 1875, and also 2d st. east from Mass. to Maryland avenue, No. 1948, Vol. A, 1875, in consideration of monies advanced by them to pay for labor in the execution of the above-mentioned contracts, giving and granting to my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute may or shall lawfully do or cause to be done by virtue hereof.

"In testimony whereof I hereunto set my hand and seal this 25th day of May, 1875.

"DANIEL A. CONNOLLY. [SEAL.]

"This agreement, made this 31st day of July, A. D. 1875, between R. W. Downman and O. C. Green, trading under the firm name of Downman & Green, of the first part, and Daniel A. Connolly of the second part, all of the city of Washington, District of Columbia, witnesseth:

"Whereas the said Daniel A. Connolly has entered into a contract with the Commissioners of the District of Columbia to make certain improvements on Mass. avenue, D. st. NE., Third st. E., and other streets designated in letters from the engineer of D. C. under dates April 21st, '75, and May 20th, '75, and any other work which may be hereafter ordered to be done in connection therewith; and whereas the said Daniel A. Connolly has requested the said Downman & Green to raise for him, and furnish from time to time as the same may be required, money sufficient to carry on and complete the said contract; and whereas the said Downman & Green have agreed to furnish said

money, and have actually paid certain sums in performance of said agreement, the said Daniel A. Connolly having executed and filed with the board of audit of the District of Columbia a power of attorney empowering the said Downman & Green to receive and receipt for all monies or certificates payable to him from the District of Columbia on account of work done under the aforesaid contract:

"Now, therefore, in consideration of the performance of the services before mentioned by the said Downman & Green, the said Daniel
63 A. Connelly here authorizes the said Downman & Green to sell or otherwise dispose of the certificates by virtue of said power of attorney aforesaid, and out of the proceeds arising therefrom first to reimburse themselves for all sums advanced under this agreement and in addition a sum equal to twelve per cent of the amount advanced by them as compensation for their time and trouble in procuring the money to be advanced according to the terms of this agreement.

"Witness our hands and seals this 31st day of July, A. D. 1875.

"DOWNMAN & GREEN. [SEAL.]
"DANIEL A. CONNOLLY. [SEAL.]

"Whereas the firm of Downman & Green, acting under a certain agreement with me, have from time to time advanced certain sums of money to me to be used in prosecution of certain contracts between me and the District of Columbia, which advances were made upon the terms set forth in said agreement; and whereas the said Downman & Green have at my request from time to time advanced other monies to me for the payment of notes, interest, taxes, &c.: Now, I do hereby acknowledge and declare that I agreed with said Downman & Green, when I requested them to make advances other than those necessary for carrying on my contract with the District of Columbia, that I would pay interest at the rate of ten per cent per annum upon all such advances by them made to me or for my use (and not embraced in the original agreement between us) from the date of such advances until payment of the same.

"DANIEL A. CONNOLLY.

"WASHINGTON, D. C., *June 15th, 1876.*

"Know all men by these presents that I, Andrew Gleason, in consideration of the sum of two thousand three hundred and eighty-one $\frac{25}{100}$ dollars in cash, and the further sum of two hundred and ninety-eight $\frac{70}{100}$ in 3.65 bonds to me paid by Daniel A. Connolly, do hereby relinquish all my interest in contract No. 243 for work on Mass. avenue, between New Jersey avenue and Lincoln square.

"ANDREW GLEASON."

Downman & Green furnished the money to carry on contracts 243 and 1948.

It does not appear that any settlement has ever been made by Downman & Green with Connolly, nor that any statement of advances and receipts by Downman & Green was ever rendered to Connolly; it appears that Downman & Green made advances amounting in all to upwards of $58,000, and that in February, 1876, their advances exceeded receipts in the sum of about $8,700.

After this (July 9, 1880) Connolly revoked his powers of attorney to Downman & Green.

XVI.

APPLICABLE TO THE CASE OF S. J. RITCHIE, NO. 150.

"Know all men by these presents that we, Rawleigh W. Downman and Osceola C. Green, as firm of Downman and Green, of Washington, D. C., in consideration of ten dollars ($10), lawful money of the United States, to us paid before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have sold, assigned, transferred, and set over unto S. J. Ritchie, of Summit County, Ohio, his executors, administrators, and assigns, to his and their own proper use and benefit, all our and each of our right, title, and interest in and to any and all sum or sums of money now due or to grow upon certain contracts between the late board of public works of the District of Columbia, numbered, respectively, 243 and 1028 (and the extensions thereof by the Commissioners of said District), between the said board of public works and one Daniel A. Connolly, together with all our right, title, and interest in and to the same by virtue of powers of attorney from said Connolly to us now in the hands or custody of the said Commissioners or otherwise; which accounts have been audited and allowed by the late board of audit of said District for the full amount of seven thousand and fifty dollars ($7,050), and we do hereby give the said S. J. Ritchie, his executors, administrators, and assigns, the full power and authority, for his or their own use and benefit, but at his or their own cost, to ask, demand,
64 collect, receive, compound and give acquittance for the same, or to any part thereof, and in our and each of our name or otherwise to prosecute and withdraw any suits or proceedings at law or in equity therefor.

"And we, the said Rawleigh W. Downman and Osceola C. Green, for and in consideration of the further sum of ten ($10) dollars to us paid by the said S. J. Ritchie at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby constitute, appoint, and substitute the said S. J. Ritchie and his assigns to be our attorney irrevocable in the premises, to do and perform all acts, matters, and things touching the premises, in the like manner to all intents and purposes as we could if personally present.

"In witness whereof we have hereunto set our hands and seals this 11th day of February, 1878.

"RAWLEIGH W. DOWNMAN. [SEAL.]
"OSCEOLA C. GREEN." [SEAL.]

XVII.

APPLICABLE TO THE CASE OF WM. M. GALT, NO. 162.

"For a valuable consideration, in hand paid by Daniel A. Connolly, of the city of Washington, in the District of Columbia, and received by me, I do hereby assign and transfer to the said Daniel A. Connolly and his assigns an interest to the extent and amount of twenty-three hundred and twenty-twenty-seven dollars ($2,327.00) in my claim against the District of Columbia for monies due me for work and labor done by me for said District under and by virtue of the terms of a certain contract between myself and said District, known as contract No. 582, to be collected and paid out of any monies due me under said contract. And I

further authorize and empower the said Connolly to demand and receive the aforesaid sum of $2,327.00 from the District of Columbia and the authorized representatives thereof, the same to be by them deducted from the amount due me.

"And I further give and grant to the said Connolly full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises as fully as I might or could do, with full power of substitution or assignment, and to receipt and sign all vouchers to the extent of the interest hereby assigned, hereby ratifying and conferring all that the said Connolly or his assigns may or shall lawfully do or cause to be done by virtue thereof.

"In witness whereof I hereunto set my hand and seal this 31st day of July, A. D. 1876.

"WILLIAM HUSSEY. [SEAL.]

"For a valuable consideration, in hand paid by William M. Galt, of the city of Washington, in the District of Columbia, and received by me, I do hereby assign and transfer to the said William M. Galt and his assigns all my right, title, and interest acquired by virtue of a certain transfer or assignment heretofore made to me by one William Hussey, and dated the 31st day of July, A. D. 1876, in and to a certain claim heretofore presented against the District of Columbia by the said William Hussey for moneys due him for work and labor by him performed for said District under and by virtue of a certain contract between the said William Hussey and the District of Columbia, known as contract No. 582.

"The extent and the amount of the interest in said claim transferred by said William Hussey to me by said assignment is $2,327.00; and I do hereby authorize and empower the said William M. Galt to demand and receive the aforesaid sum of $2,327.00 from the District of Columbia and the authorized representatives thereof, the same to be by them paid out of and deducted from any moneys due me under said contract, by virtue of said assignment or otherwise.

"And I further give and grant to the said William M. Galt full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises as fully as I might or could do, with full power of assignment or substitution, and to receipt and sign all vouchers to the extent of the said interest hereby assigned, hereby confirming all that the said William M. Galt or his assigns may or shall lawfully do or cause to be done by virtue hereof.

"In witness whereof I hereunto set my hand and seal this 31st day of July, A. D. 1876.

"DANIEL A. CONNOLLY." [SEAL.]

XVIII.

Of all the assignments and powers hereinbefore set forth the defendants had due notice.

65 DAVIS, J., delivered the opinion of the court.

This case now comes before us for a new trial, based upon assignments of error alleged to have been committed in our former findings of fact and conclusions of law.

The first error alleged is that Connolly, the contractor, is charged with $2,850.52, paid him December 5, 1873. Plaintiff urges in support of his contention that a controversy arose between Connolly and the board of public works as to his compensation; that the matter was referred to commissioners, who found a certain amount due, which was paid. This, it is contended, was, in effect, a submission to arbitration. The conclusion was in effect an award of duly empowered arbitrators, it is said, and the District can not now recover back any money paid under the commissioners' decision. The account (plaintiffs urge) must be held to be finally and conclusively settled.

The only evidence we have upon this point is found in the report to this court of the referee appointed by us prior to the former hearing. He thus reported:

"A controversy having arisen between Connolly and the board of public works in respect of the amount of work done under the original contract, No. 243, the matter was referred, on November 20, 1873, for adjudication to a commission consisting of (four names mentioned), and a settlement of the account under said original contract was made in accordance with the award of said commission as reported by that body to the board of public works November 27, 1873."

There is no dispute in this matter as to the amount of work done. The point is that Connolly was allowed board of works rates instead of his contract rates in this payment. We do not consider that the referee's report (and we have no other evidence) shows a submission to an arbitration which could produce an award binding and conclusive upon the District, or that the decision of these commissioners effected such a settlement as amounts in law to an accord and satisfaction. On the contrary, this report, in our opinion, simply shows a payment made upon the statement of adjusters appointed in the course of business, prepared upon the assumption that Connolly should be allowed board rates and not contract rates, an assumption held by this court to be unwarranted.

As to this we can only repeat our former ruling herein, to wit:

"This question has been so fully discussed in a recent opinion of the chief justice in the case of Barnes v. The District of Columbia (22 C. Cls. R., p. 366) that it is unnecessary to go over the ground again. We hold in these cases as we held there, that these orders (of the board of public works) do not change 'the written contracts between the parties made before the orders were issued, and much less contracts made thereafter.'

"The claimant coming into court for a final settlement with the District, and having received public money to which he had no legal claim, must be held liable to refund it. (22 C. C. R., 400). See also Barnard's case, 127 U. S. R., 409, 410."

We now again hold that the District can recover back the overpayment; but this only as to Connolly, the contractor.

Otherwise is it as to his assignees. Between Connolly and the defendants it may be well enough to make a general account covering all his contracts, and, after striking a balance, to cause the defendant to pay the sum shown due him or to authorize the defendant to recover the sum due from him, as the result may be in Connolly's favor or against him. But an assignee of a contract which is profitable can not be charged with his assignor's loss upon another—entirely different and losing—contract,

66 when, as in this case, he has furnished the money upon which the contract was completed, with the knowledge of the defendant. The rights of Connolly's assignees, therefore, are (after the assignment of which defendant had knowledge) not to be confounded with his rights or his duties or his liabilities; if his assignee's assignment be of a profitable contract upon which something now remains due and unpaid, their recovery can not be defeated by the fact that Connolly owes the District for overpayment upon another and losing contract with which the assignees are in no way connected.

Counsel for Connolly's administrator urge that as payments, now held to be overpayments, were made to Lay & Co. as his agents or attorneys or assignees (their quality of agency is disputed), and as they were authorized to receive only what "was due" and not to receive what was not due (that is, not to receive overpayments), no recovery can be had by defendants for such overpayments. It appears, however, at this trial, that the payments made to Lay & Co. reached Connolly. In view of this fact, to wit, that Connolly had the benefit of the payment, we see no reason to change our finding of fact or to examine the nature of Lay & Co.'s assignment or power of attorney, as to which there is dispute. We allow the exception as to Finding X, and allow the $300.04.

During the trial it was stated that all questions between the different assignees were reserved. Judgment will therefore be suspended.

67 OCTOBER 19, 1895.

On motion suggesting death of Osceola C. Green, surviving partner of Downman and Green, No. 280, D. C., it was ordered that this suit be revived in the names of his executors, William A. Gordon and J. Haldsworth Gordon.

BY THE COURT.

68 In the Court of Claims.

Findings of fact and conclusions of law.—Filed June 22, 1896.

COLUMBUS J. ESLIN, ADMR. OF DANIEL A. Connolly, *vs.* THE DISTRICT OF COLUMBIA, } No. 375.

Consolidated with

SAMUEL J. RITCHIE *vs.* THE DISTRICT OF COLUMBIA, } No. 150.

HARRIET T. GALT, EXRX. OF WILLIAM M. Galt, *vs.* THE DISTRICT OF COLUMBIA, } No. 162.

WILLIAM A. GORDON AND J. HOLDSWORTH Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, *vs.* THE DISTRICT OF COLUMBIA. } No. 280.

These cases coming on to be heard on the defendant's exceptions to the referee's report, the court, after hearing the argument of counsel and being advised in the premises, overrules the defendant's exceptions thereto and confirms said report and adopts the same as the findings of the court. The distribution of the amount found due, to wit, $13,458.33, as agreed upon by and between the claimants as stated by the referee in his report, the court adopts.

69

CONCLUSIONS OF LAW ON REFEREE'S REPORT.

Upon the facts stated in the referee's report the court, under the act February 13, 1895 (28 Stat. L., 664), and in accordance with the agreement of the parties, decides as conclusions of law as to the said sum of $13,458.33, so found due from the District of Columbia that the several claimants named below each recover judgment against the United States in the amounts stated, viz:

In favor of Columbus J. Eslin, administrator of Daniel A. Connolly, cause No. 375, four thousand eight hundred and forty-one dollars and twenty-six cents	$4,841.26
In favor of Samuel J. Ritchie, cause No. 150, five thousand three hundred and thirty-nine dollars and thirty cents	5,339.30
In favor of Harriet T. Galt, executrix of William M. Galt, cause No. 162, two thousand and twenty-seven dollars and one cent	2,027.01
In favor of William A. Gordon and J. Holdsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, cause No. 280, one thousand two hundred and fifty dollars and seventy-six cents	1,250.76
Amounting in all to	13,458.33

which said sum, and as well the several amounts composing the same, were due and payable February 1st, 1876.

70

In the U. S. Court of Claims.

COLUMBUS J. ESLIN, ADMINISTRATOR OF DANIEL A. CONNOLLY, *vs.* THE DISTRICT OF COLUMBIA, } No. 375.

Consolidated with

SAMUEL J. RITCHIE *vs.* THE DISTRICT OF COLUMBIA, } No. 150.

HARRIET T. GALT, EXECUTRIX OF WILLIAM M. GALT, *vs.* THE DISTRICT OF COLUMBIA, } No. 162.

WILLIAM A. GORDON AND J. HOLDSWORTH GORDON, executors of Osceola C. Green, surviving partner of Downman & Green, *vs.* THE DISTRICT OF COLUMBIA. } No. 280.

REPORT OF JOHN W. ANDERSON, REFEREE.

71 *Index to report of referee.*

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72 In the U. S. Court of Claims.

COLUMBUS J. ESLIN, ADMR. OF DANIEL A. Connolly, *vs.* THE DISTRICT OF COLUMBIA. } No. 375.

Consolidated with

SAMUEL J. RITCHIE *vs.* THE DISTRICT OF COLUMBIA. } No. 150.

HARRIET T. GALT, EXRX. OF WILLIAM M. Galt, *vs.* THE DISTRICT OF COLUMBIA. } No. 162.

WILLIAM A. GORDON AND J. HOLDSWORTH Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, *vs.* THE DISTRICT OF COLUMBIA. } No. 280.

REPORT OF JOHN W. ANDERSON, REFEREE.

To the Honorable Chief Justice and Associate Justices of the Court of Claims:

73 In accordance with an order passed by your honorable court on the 20th day of May, 1895, remanding the above-entitled causes to me, as referee, to take and state the accounts between the said claimants and the said District, under the contracts set forth in the petitions in said causes, I herewith respectfully submit the following report:

The law of Congress under which the account is now stated was approved February 13, 1895, and reads as follows:

"Public, No. 49.—An act to amend an act entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' approved June sixteenth, eighteen hundred and eighty.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the adjudication of claims brought under the provisions of the act entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' approved the sixteenth of June, eighteen hundred and eighty (Twenty-first Statutes at Large, page two hundred and eighty-four), the Court of Claims shall allow the rates established and paid by the board of public works; and whenever said rates have not been allowed the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause."

74 The causes mentioned herein have been consolidated and are tried together. They comprise claims for work done and materials furnished by Daniel A. Connolly, now deceased, under and by virtue of certain contracts entered into by and between the board of public works of the District of Columbia and the said Connolly, in the years 1872, 1873, 1874, and 1875, for the improvement of the streets of Washington, and sundry extensions of said contracts subsequently entered into with the Commissioners of the District of Columbia, who succeeded the said board.

In case No. 375, Columbus J. Eslin, the administrator of Connolly, claims that the District of Columbia still owes to the estate he represents the aggregate sum of $13,458.33, with interest from February 1, 1876, under 11 contracts, numbered as follows: 209, 231, 243, 349, 595 (which includes 1057½), 665, 690, 828, 1028, and 1035. This unpaid balance arises from the fact that what is known as "board rates" were not allowed in the adjustment of the claims. The administrator denies the right of any of the assignees in the other causes consolidated herewith to recover from the District of Columbia any part of the above-mentioned amount.

In case No. 150, Samuel J. Ritchie claims the sum of $7,050, with interest from February 1, 1876, under and by virtue of an assignment to him from Downman & Green, dated February 11, 1878. This firm held assignments from Connolly to reimburse them for moneys advanced to aid in carrying on work under contracts Nos. 243 and 1028.

75 In the case No. 162, Harriet T. Galt, executrix of William M. Galt, claims the sum of $2,327, with interest from May 4, 1875, under and by virtue of an assignment to Galt from Connolly, dated July 31, 1876, based upon work done under contract No. 243.

In case No. 280, William A. Gordon and J. Holdsworth Gordon, executors of the estate of Osceola C. Green, deceased, surviving partner of Downman & Green, claim the sum of $4,425.04, with interest from February 1, 1876, under and by virtue of certain assignments and powers of attorney from Connolly to Downman & Green, made in the years 1874 and 1875, for moneys advanced to furnished labor and material under contracts Nos. 243 and 1028. The amount stated is what is left of the unpaid balances aggregating $11,475.04, after satisfying the assignment to Samuel J. Ritchie of $7,050, under the contracts above mentioned.

Pursuant to an agreement between the counsel for the various claimants, the accounts are stated under the contracts between the District

of Columbia and Daniel A. Connolly, upon which it is claimed balances are still due and unpaid. I have deferred the determination of the questions as to the claims of the assignees and the amounts due them under their respective assignments.

A portion of the figures and exhibits employed by a referee in a previous statement to the court have, after verification, been used in the present report.

76 The contracts are taken up and stated in numerical order as follows:

CONTRACT NO. 209.

By this contract (Exhibit 4, D. D., Referee, Docket 280), made and concluded the 20th day of January, 1872, by and between the board of public works of the District of Columbia and Daniel A. Connolly, of the city of Washington, D. C., the said Connolly agreed, among other things, to set the curbstones and to lay and put down the brick foot pavements and the guttering on the west side of Fourth street east, from M street south to Georgia avenue, in the city of Washington, D. C.

In consideration of the work so to be done, it was stipulated in said contract (article 10) that the said Connolly should receive the following prices therefor, viz:

	Cents.
Grading, per cubic yard	20
Paving with new brick, per square yard	80
Relaying old brick pavement, per square yard	25
Setting new curbstones (6 in.), per lineal foot	30
Resetting old curbstones (4 in.), per lineal foot	15
Paving with new cobblestones, per square yard	55
Relaying with old cobblestones, per square yard	30
Gutter flags (12 inches), per lineal foot	35
Gutter flags (16 inches), per lineal foot	50

Provided, That bricks shall be furnished by the board at a price not exceeding $11.50 per thousand.

77 The account under contract No. 209 is thus stated:

DR.

To total amount of work done and materials furnished by Connolly under said contract, as certified to by the assistant engineer of the board of public works and approved by the chief engineer of said board, at the rates stipulated in the said contract (Exhibit 5, D. D., Referee)		$2,361.07

CR.

By payments in certificates of the board of public works:		
No. 990, dated December 23, 1871	$1,500.00	
No. 376, dated February 6, 1872	626.25	
No. 1534 (part), dated April 7, 1873	34.90	
		2,161.15
Leaving a balance due claimant of		199.92

This balance of $199.92 consists of an error on the part of the auditor of the board of public works in auditing the account under the said contract No. 209 respecting an item of 714 running feet of 5-inch new curb and setting, allowed by him at 92 cents per foot, being only the cost of furnishing the material, in lieu of 120 cents per foot, the cost of furnishing and setting, making a difference of 28 cents per foot on 714 feet of curb—$199.92, as stated.

78 CONTRACT NO. 231.

By this contract (Exhibit 6, D. D., Referee, Docket 280), made and concluded the 18th day of April, 1872, by and between the board of public works of the District of Columbia and Daniel A. Connolly, of Washington, D. C., the said Connolly agreed, among other things, to construct a 12-inch pipe sewer in front of square 732, a distance of about 300 feet, and connecting with the 15-inch sewer on Second street, in the City of Washington, D. C.

For furnishing all the materials and labor required in the prosecution of the work, it was stipulated in said contract (article 10) that the said Connolly should receive the following prices, viz: Laying and furnishing 12-inch pipe per lineal foot, 88 cents; excavation and refilling, 40 cents per cubic yard, to be measured in excavation only.

The account under contract No. 231 is thus stated:

DR.

To total amount of materials furnished and work done under said contract, as certified to by the assistant engineer of the board of public works and approved by the chief engineer of said board (Exhibit 7, D. D., Referee)	$1,149.07

79 CR.

By materials:			
450 feet 12-inch pipe, at 65c. per foot	$292.50		
42 feet 12 by 6 inch pipe, at $1.10 per foot	46.20		
1 12-inch bend	2.75		
		$341.45	
By certificates:			
No. 1474, dated May 11, 1872	754.79		
No. 1534 (part), dated April 7, 1873.	51.10		
		805.89	
			1,147.34
Balance due claimant			1.73

This balance of $1.73 arises out of clerical errors on the part of the auditor of the board of public works in stating the account under said contract No. 231.

CONTRACT NO. 243.

By this contract (file No. 1, docket 162), made and concluded the 24th day of April, 1872, by and between the board of public works of the District of Columbia and Daniel A. Connolly, of Washington, D. C.,

the said Connolly agreed, among other things, to furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to grade Massachusetts avenue from New Jersey avenue to Lincoln Square, in the city of Washington, D. C.

80 For furnishing the materials and labor so specified it was stipulated in said contract (article 10) that the said Connolly should receive the following prices therefor: Grading, 30 cents for each cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and 1 cent additional per cubic yard for every two hundred (200) feet of haul beyond the above.

On May 4, 1875, the said contract No. 243, theretofore entered into, was executed and enlarged by and between the Commissioners of the District of Columbia and the said Daniel A. Connolly (file No. 2, docket 162), so as to embrace the following work, viz:

"Grading upon the following streets, between the points named: B street south, between Fourth street east and Boundary; C street north, between Fourth street east and Boundary; A street south, between Third street east and Boundary: D street north, between First and Fourth streets east; Delaware avenue, between C street north and Boundary; E street north, between Second street east and New Jersey avenue; Sixth street east, between Massachusetts avenue and East Capitol street; First street east, between C street north and Boundary; or upon such of these streets as the engineer of the District of Columbia may determine.

"It is understood that the work herein described is in lieu of similar work relinquished on Massachusetts avenue, and the engineer aforesaid shall determine what amount of grading will be a just equivalent for the work relinquished on said Massachusetts avenue, as contemplated by this agreement."

81 On October 6, 1875, the said Daniel A. Connolly entered into another extension of said contract No. 243 (file No. 3, docket 162) with the said Commissioners of the District of Columbia, by which he agreed to relay the old material on Massachusetts avenue, between New Jersey avenue and Lincoln Square, whereever directed by the engineer of the District of Columbia.

It was stipulated in both extensions of said contract No. 243 that the said Connolly, for the work done thereunder, should receive the prices established and paid by the board of public works for the work of similar character: Provided, That payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

A controversy having arisen between Connolly and the board of public works in respect to the amount of work done under the original contract No. 243, the matter was referred on November 20, 1873, for adjudication to a commission, consisting of S. T. G. Morsell, Thomas M. Plowman, Joseph F. Collins, and W. P. Bell, and a settlement of the account under said original contract was made in accordance with the award of said commission, as reported by that body to the board of public works November 27, 1873.

82 Referring to the foregoing paragraph, the Court of Claims, in its findings of fact decided May 28, 1894, when this and other cases were before the court under a former accounting by a referee, say that there is not sufficient evidence to support the statement of the referee. In the opinion of the court, delivered by Judge Davis, on page 16 of the said findings of fact, he states that—

"There is no dispute in this matter as to the amount of work done. The point is that Connolly was allowed board of works rates instead of his contract rates in this payment. We do not consider that the referee's report (and we have no other evidence) shows a submission to an arbitration which could produce an award binding and conclusive upon the District, or that the decision of these commissioners effected such a statement as amounts in law to an accord and satisfaction. On the contrary, this report, in our opinion, simply shows a payment made upon the statement of adjusters appointed in the course of business prepared upon the assumption that Connolly should be allowed board rates and not contract rates, an assumption held by this court to be unwarranted."

As the act of February 13, 1895, under which these accounts are now revised, eliminates the objections of the court from the consideration of the claims in controversy, I have restated the said account.

The account between the said board of public works and the said Connolly, under contract No. 243 and extensions thereof, is stated as follows:

83 DR.

The amount of work done by said Connolly under said contract, as per award of the commission dated November 27, 1873, as accepted by the assistant engineer and approved by the engineer, B. P. W., in charge:	
105,720 cubic yards grading, at 30c	$31,716.00
67,713 cubic yards haul, 805 feet over 200 feet, at ¼c	2,708.52
(This work was commenced and finished before January 1, 1873.)	
38,007 cubic yards haul, 1,000 feet over 200 feet, at 1¼c	4,750.84
(This work was commenced and finished after January 1, 1873.)	
	39,175.36
Materials furnished and work done under extensions of contract No. 243, at board rates:	
Aggregate Massachusetts avenue (file No. 29, docket 280)	63,730.41
Aggregate D street between Third and Fourth streets (file No. 16, docket 280)	4,944.40
Aggregate D street NE. between First and Third streets (file No. 25, docket 280)	1,181.61
Aggregate D street NE. between First and Second streets (file No. 25, docket 280)	1,351.07
Aggregate Sixth street between East Capitol street and Massachusetts avenue (file No. 28, docket 280)	10,066.63
Aggregate Sixth street NE. between A and B streets (file No. 21, docket 280)	734.11
Aggregate Massachusetts avenue between Sixth and Seventh streets NE. (file No. 21, docket 280)	1,016.75
Aggregate Fifth street between D and F streets NE. (file No. 4, docket 162)	2,327.91
Total	125,228.25

84 CR.

By materials (file No. 29, docket 280), 4,013.51 cubic yards of sand and gravel, at 25c	$1,003.38	
(File No. 20, docket 280) 36 feet 6-inch granite corners, at $1.75	63.00	

(File No. 27, docket 280) 2,036 feet of 5-inch curb, at 95c	$1,934.20		
83 feet of 6-inch curb, at $1.12 per foot	92.96		
4 feet of circular curb, at $1.75 per foot	7.00		
2,084 feet 12-inch gutter stone, at 23c. per foot	479.32		
5,396 feet of 16-inch gutter stone, at 36c. per foot	1,942.56		
662 cubic yards of cobblestone, at $1	662.00		
40,985 bricks, at $10	409.85		
		$6,594.27	
By certificates of board of public works:			
No. 1618, dated May 11, 1872	1,000.00		
1700, dated June 1, 1872	1,500.00		
1858, dated June 15, 1872	2,000.00		
1958, dated June 22, 1872	3,218.27		
2087, dated July 5, 1872	1,929.57		
2264, dated July 17, 1872	3,376.20		
85 No. 2555, dated August 5, 1872	5,000.00		
3572, dated November 30, 187	500.00		
1515, dated April 4, 1873	5,178.38		
1868, dated June 3, 1873	2,500.00		
1869, dated June 3, 1873	500.00		
1906, dated June 7, 1873	1,980.00		
4217, dated December 2, 1873	3,000.00		
4296, dated December 5, 1873	7,492.94		
By board of audit certificates:			
No. 10971, dated February 1, 1875	5,925.18		
14115, dated February 1, 1875	5,350.60		
14116, dated February 1, 1875	26.67		
14682, dated July 1, 1875	9,050.00		
14683, dated July 1, 1875	21.93		
14733, dated August 2, 1875	3,955.52		
19034 / 19035 dated October 1, 1875	16,454.50		
19081 / 19082 dated October 1, 1875	2,188.56		
19340, dated November 1, 1875	1,750.86		
19480, dated December 1, 1875	4,113.62		
19559, dated December 1, 1875	3,377.26		
25038, dated January 1, 1876	12,066.17		
25039 (part), dated January 1, 1876	7,571.72		
		$111,027.35	
Total payments			$117,621.62
Balance			7,606.63

86 To which should be added the following items erroneously charged against Connolly (file 27, docket 280) in respect to materials obtained on the line of improvement of Massachusetts avenue between New Jersey avenue and Lincoln Square, viz:

Material retained by property holders:			
56.7 feet 5-inch curb, at 95c	$53.87		
27,447 bricks, at $10 per M	274.47		
39.5 feet of 12-inch gutter stone, at 23c	9.10		
		$337.44	
Material charged to Campbell and Eslin, intersections of Eighth, Ninth, and Tenth streets:			
455 feet of 5-inch curb, at 95c	432.25		
7,048 bricks, at $10 per M	70.48		
328 feet of 12-inch gutter stone, at 23c	75.44		
2130 feet of 16-inch gutter stone, at 36c	766.80		
142.11 cubic yards of cobblestone, at $1	142.11		
		1,487.08	
Material returned to property yard:			
104 feet of 5-inch curb, at 95c		98.80	
			$1,923.32
Making the total amount due claimant under contract No. 243 and extensions thereof			9,529.95

87 Regarding the foregoing additional credit of $1,923.32 allowed claimant for material retained by property holders, a record of the items composing that aggregate appears in the books of the office of superintendent of property, board of public works. On page 339, old material book, an entry shows that the receipts and affidavits were filed, but they can not now be found in the office of the Commissioners of the District of Columbia.

CONTRACT NO. 349.

By this contract (Exhibit 8, D. D., referee, docket 280), entered into on the 24th day of June, 1872, by and between the board of public works of the District of Columbia and Daniel A. Connolly, of Washington, D. C., the said Connolly agreed, among other things, to furnish, at his own proper cost and expense, all the necessary material and labor, and in a good, firm, and substantial manner to set the curbstones, lay and put down the brick foot pavements, and pave the gutters on the west side of First street east, between B and C streets south, in the city of Washington, D. C.

It was stipulated in and by said contract (article 10) that for the work to be done thereunder, and in all respects completing the same, the said Connolly should receive the following prices, to wit:

88 Grading, 30 cents per cubic yard, including a haul of 200 feet, and one (1) cent additional per cubic yard for every 200 feet of haul beyond the first 200 feet.

	Cents.
Laying brick pavement (new), per square yard	80
Relaying brick pavement (old), per square yard	25
(Provided, that the board shall furnish bricks at a price not exceeding $11.50 per thousand.)	
Setting curbstone (new 8-inch), per lineal foot	40
Setting curbstone (new 6-inch), per lineal foot	30
Setting curbstone (new 5-inch), per lineal foot	25
Resetting curbstone (old 4-inch), per lineal foot	15
Laying cobblestone (new), per square yard	55
Relaying cobblestone (old), per square yard	30
Gutter flags (12-inch), per lineal foot	35
Gutter flags (16-inch), per lineal foot	50
Gutter flags (12-inch), relaying, per lineal foot	12
Gutter flags (16-inch), relaying, per lineal foot	12

The account under said contract No. 349 is stated as follows:

DR.

To amount of work done and materials furnished by the said Connolly under said contract No. 349, as certified to by the assistant engineer of the board of public works, and approved by the chief engineer of said board, at board rates:

89 Exhibit 9, D. D., referee, docket 280	$799.41	
Materials furnished and work done under said contract, under the Commissioners of the District of Columbia, as approved by Lieutenant R. L. Hoxie, engineer, District of Columbia (Exhibit 10, D. D., referee, docket 280)	4,927.31	
		$5,726.72
Less a deduction for inferior material and workmanship on 1,303.36 square yards of brick pavement, at 25c per yard		325.84
		$5,400.88

CR.

By certificates:		
No. 2208, dated July 11, 1872	$741.41	
1534, dated April 7, 1873	13.20	
10917 } dated December 1, 1874	2,932.30	
10918 }		
10945, dated December 1, 1874	928.29	
		4,615.20
Leaving a balance due claimant under said contract No. 329 of		$785.68

90 CONTRACTS NOS. 595 AND 1057½.

By contract No. 595 (Exhibit 19, D. D., referee, docket 280), made and concluded the 12th day of November, 1872, by and between the said board of public works and the said Daniel A. Connolly, as aforesaid, to set the curbstones and lay and put down cobblestone in gutters on the north side of A street south between Sixth and Seventh streets east; also, to grade A street south between First and Second streets east.

The prices stipulated to be paid Connolly for the work to be done under this contract are as follows:

	Cents.
Setting curbstones, new, 8-inch, per lineal foot	40
Setting curbstones, new, 6-inch, per lineal foot	30
Setting curbstones, new, 5-inch, per lineal foot	25
Resetting curbstones, old, 4-inch, per lineal foot	15
Laying cobblestone pavement, per square yard	55
Relaying cobblestone pavement, per square yard	30
Gutter flags, 12-inch, per lineal foot	35
Gutter flags, 16-inch, per lineal foot	50

Grading, 30 cents per cubic yard, to include the first 200 feet of haul, and 1¼ cents per cubic yard for each additional 100 feet of haul beyond the first 200 feet.

91 By contract No. 1057½ (Exhibit 20, D. D., referee, docket 280), made and entered into on the 8th day of April, 1874, the said Daniel A. Connolly agreed to lay and put down the pavement known as and called the "Phillips Round Block Pavement" on the carriageway of A street SE., between First and Second streets.

No price is stipulated in said contract No. 1057½ for the work to be done thereunder.

The account under said contracts Nos. 595 and 1057½ is stated as follows:

DR.

To amount of work done under said contracts Nos. 595 and 1057½, as per vouchers and other papers:		
Aggregate (Exhibit 21, D. D., referee, docket 280)	$9,582.23	
Aggregate (Exhibit 22, D. D., referee, docket 280)	321.31	
Aggregate (Exhibit 23, D. D., referee, docket 280)	8.89	
Total		$9,912.43

CR.

By 127 feet of old curb, at 95c	$120.65		
Cost of inferior brick pavement	208.31		
		$328.96	
92 By certificates:			
No. 4032, dated November 5, 1873	$2,000.00		
1300, dated April 21, 1874	4,400.00		
10582, dated August 1, 1874	1,635.00		
10894, dated November 1, 1874	1,151.62		
14014, dated December 1, 1874	321.31		
14131 (part), dated August 1, 1874	8.89		
		9,515.82	
			$9,845.78
Balance due claimant under said contracts Nos. 595 and 1057½			66.65

CONTRACT NO. 665.

By the terms of this contract (Exhibit 24, D. D., referee, docket 280), which instrument was dated April 22, 1873, the said Daniel A. Connolly agreed to grade, set the curbstones, lay and put down the brick foot pavements on B street north, between Second and Fourth streets east, and to grade alley in square numbered 758.

The rates to be paid (article 10) are specified as follows:

Grading 30 cents per cubic yard, to include the first 200 feet of haul, and one cent per cubic yard for every additional 200 feet of haul
93 beyond the first 200 feet. Grading old graveled streets, for first two feet per cubic yard, 40 cents.

	Cents.
Laying brick pavement, new, per square yard	80
Relaying brick pavement, old, per square yard	25

Bricks were to be furnished by the board of public works, at a cost not exceeding $11.50 per thousand, and for setting and resetting curbstones the customary board rates were to be allowed.

The account under said contract No. 665 is stated as follows:

DR.

The amount of work done under said contract No. 665, as certified to by the engineer of the District of Columbia:		
Aggregate (Exhibit 25, D. D., referee docket 280)		$11,446.94
Extra work (file 9, docket 280)		229.42
Extra work (Exhibit, part No. 23, D. D., referee, docket 280)		23.80
Total		11,700.16

CR.

By 340 feet of 4½ curb, at 70c		$238.00	
Inferior workmanship		257.94	
Work done by private parties		243.56	
			739.50
94 By certificates:			
No. 2009, dated July 2, 1873	2,957.40		
2698 to 2700 (part), dated August 28, 1873	2,000.00		
3386 to 3391, dated October 13, 1873	3,000.00		
1492, dated May 25, 1874	700.00		
10582 (part), dated August 1, 1874	1,177.57		
14131 (part), dated August 1, 1874	23.80		
10973, dated February 1, 1875	545.64		
		10,404.41	
			11,143.91
To balance due claimant under said contract No. 665			$556.25

CONTRACT NO. 690.

According to this agreement (Exhibit 27, D. D., referee, docket 280), which was entered into on the 20th day of May, 1873, the said Daniel A. Connolly agreed to grade, set the curbstone, and lay and put down the brick foot pavements on B street north, from Delaware avenue to Second street east; also to grade the carriageway, set the curbstones, and lay and put down the brick foot pavements on First street east, between
95 East Capitol street and B street north; also to grade the sidewalks on the east side of First street east, between A and B streets north.

This contract, although bearing date as of May 20, 1873, does not appear to have been executed until November, 1873, as the records of the Board of Public Works show that several amendments and modifications of said contract were ordered to be made between May and November, 1873, the last amendment ordered being November 1, 1873, all of which appear in the body of the contract as of May 20, 1873.

The amendments referred to, together with the original award, numbered, respectively, Exhibits Nos. 28 to 33, inclusive, D. D., referee, docket 280, are as follows:

On May 20, 1873, B. Oertly, deputy engineer, sent a written order to W. E. Nott, esq., contract clerk, under an order of the board of the 19th of May, 1873, directing him to prepare a contract with Daniel A. Connolly for grading, setting curb, and laying the sidewalks on B street north, from Delaware avenue to First street east; and First street east, from B street north to B street south; work to be completed in 30 working days, and the dirt to be deposited in the reservation at the foot of the Capitol.

On January 10, 1873, B. Oertly, deputy engineer, under direction of the board, ordered William E. Nott, esq., contract clerk, to amend contract No. 690, with D. A. Connolly, so as to include grading B street, between First and Second streets NE.

96 On August 25, 1873, Charles E. Barney, assistant engineer, directed William E. Nott, esq., contract clerk, under an order of the board, among other things, to cancel so much of contract No. 690, with D. A. Connolly, as relates to First street east, between East Capitol street and B street.

On September 26, 1873, Adolf Cluss, engineer in charge, by order of the board, directed William E. Nott, esq., contract clerk, to amend contract No. 690, with D. A. Connolly, so as to include setting curbs and laying sidewalks on B street, between First and Second streets NE.

On October 3, 1873, Adolf Cluss, engineer in charge, by order of the board, directed William E. Nott, esq., contract clerk, to amend contract No. 690, with D. A. Connolly, so as to include the cutting down the sidewalk on the east side of First street east, between A street north and B street south, so that the foot walk may be laid.

On November 1, 1873, Adolf Cluss, engineer in charge, in accordance with instructions from the board of that date, notified William E. Nott, esq., contract clerk, that D. A. Connolly had been allowed 40 cents per cubic yard for grading First street east.

The prices stipulated to be paid for doing the work embraced in contract No. 690 (article 10) are as follows:

Grading, 30 cents per cubic yard, to include the first 200 feet of haul, and one cent additional per cubic yard for every additional 200 feet of haul beyond the first 200 feet for B street; and 40 cents per cubic
97 yard for First street, the conditions as to haul being the same as on B street. For laying brick foot pavements and setting curbstones the rates are the same as those specified in other contracts in this cause.

In view of the differences between the orders to the contract clerk and the contract itself, as also from the fact that the engineers' certificates of measurement of work done on First street east does not state that said work was done under any contract, but gives the limits as First street east, between B street south and C street north (the limits expressed in the contract being between East Capitol street and B street north), the account is stated in accordance with the engineers' certificate and the audit as made by the auditor of the board of public works.

The following is the statement of the account under contract No. 690:

DR.

To amount of work done under said contract No. 690, as per the final measurement of Assistant Engineer Charles E. Barney:			
First street east, B south to C north (Exhibit 34, D. D., referee, docket 280), aggregate as per engineer's certificate			$41,826.39
B street NE., between First and Second streets (Exhibit 35, D. D., referee, docket 280), aggregate as per engineer's certificate			6,170.19
98 Extra work (Exhibit 23, D. D., referee, docket 280)			266.26
Extra work (file 9, docket 280)			9.80
			$48,272.64

CR.

By materials:			
2,825½ feet of 6-inch curb, at $1.12	$3,164.22		
428½ feet of 8-inch curb, at $1.75	750.22		
55 feet of circular curb, at $1.75	96.25		
140 feet of 5-inch curb, at 95c	133.00		
638½ feet of 6-inch curb, at $1.12	715.03		
Permit work	70.00		
Inferior parking	246.45		
Inferior brick pavement	230.12		
		5,405.29	
By certificates:			
No. 2239, dated July 16, 1873	12,000.00		
2471, } dated August 9, 1873	12,000.00		
2472, }			
2700, dated August 28, 1873	1,000.00		
2952, dated September 16, 1873	8,000.00		
4053, dated November 25, 1873	2,500.00		
99 4861, dated December 31, 1873	2,267.43		
10582 (part), dated August 1, 1874	112.15		
10972, dated February 1, 1875	4,510.81		
14131 (part), dated August 1, 1874	266.26		
14467, dated June 1, 1875	180.21		
		42,836.86	
			48,242.15
To balance due claimant under contract No. 690			30.49

CONTRACT NO. 828.

By this agreement (Exhibit 39, D. D., referee, docket 280, entered into on the 8th day of August, 1874, the said Daniel A. Connolly agreed

to excavate for, construct, and complete with necessary manholes and traps, a twelve-inch pipe sewer in alley in square No. 686.

The account under said contract No. 828 is stated as follows:

DR.

To amount of work done under the said agreement (contract No. 828), as per file 9, docket 280	$859.52	
Per file 28, docket 280	300.04	
		$1,159.56

100

CR.

By materials:		
426 feet of 12-inch pipe, at 65c	$276.90	
36 feet of 12 by 6 inch pipe, at $1.10	39 60	
	316.50	
By certificate:		
No. 10582, dated August 1, 1874	543.02	
Total		859.52
To balance due claimant under Contract 828		300.04

CONTRACT NO. 1028.

By this agreement (file No. 1, docket 280), dated January 30, 1874, the said Daniel A. Connolly agreed to furnish, at his own proper cost and expense, all the necessary materials and labor, and in a good, firm, and substantial manner to grade G street north, between Second and Fifth streets east; also, to grade Second street east, between Maryland avenue and D street north, at the following prices (article 10):

Grading, 30 cents per cubic yard, to include the first 200 feet of haul, and 1¼ cents per cubic yard for every additional 100 feet of haul beyond the first 200 feet.

On May 18, 1875, the said contract 1028 was extended by the Commissioners of the District of Columbia so as to embrace the fol-

101 lowing work, to wit: Replace the old material that is to say, reset the curbs and relay the brick foot-pavements wherever ordered by the engineer of the District of Columbia, on streets the improvement of which are embraced in said contract No. 1028.

For the work to be done under said extension it is therein stipulated that he shall receive the prices established and paid by the board of public works for work of similar character. (File 2, docket 280.)

The account under said contract 1028 and extension thereof is stated as follows:

DR.

To amount of work done under said contract and extension (contract 1028), as per the following aggregates:		
Second street NE., Maryland avenue to D (file 11, 280)	$2,782.37	
G street NE., Second to Fifth (file 14, docket 280)	2,265.66	
Second street NE., between B and D streets (file 22, docket 280)	184.00	
Second street NE., Maryland avenue to D street (file 26, docket 280)	2,100.21	
Second street NE., Maryland avenue to D street (file 26, docket 280)	7,663.57	
Second street NE., between D and E streets (file 28, docket 280)	2,931.58	
		$17,927.39

102

Cr.

By materials:

File 17, docket 280:		
99 feet of 6 inch pipe, at 17c	$16.83	
111 feet of 12-inch pipe, at 65c	72.15	
45 feet of 12 by 6 inch pipe, at $1.10	49.50	
File 18:		
288 feet of 12-inch pipe, at 65c	187.20	
File 21:		
520 feet of 15-inch pipe, at $1.10	572.00	
81 feet of 15 by 6 inch pipe, at $1.50	121.50	
963 feet of 12-inch pipe, at 65c	625.95	
117 feet of 12 by 6 inch pipe, at $1.10	128.70	
353 feet of 6-inch pipe, at 17c	60.01	
275 cubic yards of gravel, at 25c	68.75	
File 26:		
494.8 cubic yards of gravel, at 25 cents	123.70	
		$2,026.29
By certificates:		
No. 4400, dated December 9, 1873	1,500.00	
10582 (part), dated August 1, 1874	2,025.16	
13688, dated August 1, 1874	2,225.90	
14132, dated August 1, 1874	240.50	
103 No. 19363, dated December 1, 1875	184.00	
19560, dated December 1, 1875	5,435.18	
25039 (part), dated January 1, 1876	2,345.27	
	13,956.01	
		$15,982.30
To balance due claimant under said contract No. 1028		1,945.09

CONTRACT NO. 1035.

By this agreement (Exhibit 41, D. D., referee, docket 280), entered into on the 5th day of March, 1874, by and between the board of public works of the District of Columbia and Daniel A. Connolly, of Washington, D. C., the said Connolly agreed to furnish, at his own proper cost and expense, all the necessary materials and labor, and in a good, firm, and substantial manner to grade, set the curbstones, and lay and put down the brick foot pavements on Carroll street, running through square No. 732.

For the performance of the work therein embraced he was to receive the following prices, as per article 10:

Grading, 30 cents per cubic yard, to include the first 200 feet of haul, and 1¼ cents per cubic yard for every additional 100 feet of haul beyond the first 200 feet.

104 Laying brick foot pavement, new, per square yard, $1; relaying brick foot pavement, old, per square yard, 25 cents; and for setting and resetting curbstones, the usual board rates.

The account under said contract No. 1035 is stated as follows:

Dr.

To amount of work done under contract No. 1035, as per the following aggregates:		
Exhibit 42, D. D., referee, docket 280	$3,512.16	
Exhibit 23, D. D., referee, docket 280	239.82	
		$3,751.98

Cr.

By material:		
1,149 feet of old curb, at 70c	$804.30	
Sand and gravel	27.00	
Cost of removing dirt	270.00	
Other charges	17.97	
		1,119.27

105 By certificates:

No. 10882, dated August 1, 1874	$2,110.36	
10965, dated August 1, 1874	240.00	
14131 (part), dated August, 1874	239.82	
	$2,590.18	
		$3,709.45
To balance due claimant under contract No. 1035		42.53

RECAPITULATION.

To amounts due under the foregoing contracts:

Contract No. 209, page	$199.92
No. 231, page	1.73
No. 243, page	9,529.95
No. 349, page	785.68
No. 595, 1057½, page	66.65
No. 665, page	556.25
No. 690, page	36.49
No. 828, page	300.04
No. 1028, page	1,945.09
No. 1035, page	42.53
To balance due claimant, with interest from February 1, 1876	13,458.33

106 I find that the District of Columbia is indebted to Columbus J. Eslin, the original contractor in these cases, or his legal representatives, for labor done and materials furnished to the said District, at board rates, under the contracts aforesaid, in the aggregate sum of thirteen thousand four hundred and fifty-eight dollars and thirty-three cents ($13,458.33).

At a convention of the attorneys of the various claimants herein the following agreement was entered into:

STIPULATION.

It is hereby stipulated and agreed between the parties in the above cases, whose claims are all based upon the contracts of Daniel A. Connolly with the District of Columbia:

That if the sum of thirteen thousand two hundred and seventy-eight dollars and twenty-one cents ($13,278.21) is found to be due from the District of Columbia on account of said contracts, it shall be distributed among the parties as follows:

Harriet T. Galt, executrix of William M. Galt, two thousand dollars ($2,000.00).

William A. Gordon et al., executors of Osceola C. Green, surviving partner of Downman & Green, $1,232 75/100 dollars ($1,232 75/100).

107 Samuel J. Ritchie, $5,267 25/100 dollars ($5,267.75).

The total to be paid in the cases Nos. 289 and 150, to Downman & Green and Samuel J. Ritchie, being six thousand five hundred dollars ($6,500.00).

Columbus J. Eslin, administrator of Daniel A. Connolly, four thousand seven hundred and seventy-eight dollars and twenty-one cents ($4,778.21).

It is further agreed that in case of any reduction of the total amount found due from the District of Columbia below the sum of thirteen thousand two hundred and seventy-eight dollars and twenty-one cents ($13,278.21) the estate of said Galt is to receive the full amount of two

thousand dollars ($2,000.00), as hereinbefore stated, and the remaining parties are to divide the balance pro rata between them in proportion to the amounts above agreed upon.

And the parties to the above-named actions respectfully request the referee in this cause to report the indebtedness of the District of Columbia to the respective claimants in accordance with the above stipulation, and respectfully move that the judgment of the court be entered in each case in accordance with the proportion above as a full settlement of the demands embraced in the respective petitions.

CHARLES & WM. B. KING,
Attorneys for Columbus J. Eslin, Admr. of Daniel A. Connolly.

108 J. W. DOUGLASS,
Attorney for William A. Gordon et al., Executors.

SHELLABARGER & WILSON,
Attorneys for Samuel J. Ritchie.

GEORGE A. KING,
Attorney for Harriet T. Galt, Exec'x.

[Endorsement.]

It having been found that the amount due from the District of Columbia is $13,458.33, it is agreed that the difference of $180.12 between this amount and the total stated herein of $13,378.21 shall be divided among the parties in the ratio herein fixed.

CHARLES & WM. B. KING,
Attorneys for Eslin, Admr.

J. W. DOUGLASS,
for D. & G.

SHELLABARGER & WILSON,
By HEMPHILL,
for Ritchie.

GEORGE A. KING,
for Harriet T. Galt.

109 Under and by virtue of the provisions contained in the aforesaid agreement, and in accordance with the evidence filed in these cases, I report that the following-named claimants are entitled to the judgment of this court in the sum set opposite their respective names, as debts due and payable by the District of Columbia on February 1, 1876:

Columbus J. Eslin, administrator of Daniel A. Connolly, cause No. 375, four thousand eight hundred and forty-one dollars and twenty-six cents	$4,841.26
Samuel J. Ritchie, cause No. 150, five thousand three hundred and thirty-nine dollars and thirty cents	5,339.30
Harriet T. Galt, executrix of William M. Galt, cause No. 162, two thousand and twenty-seven dollars and one cent	2,027.01

William A. Gordon and J. Holdsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, cause No. 280, one thousand two hundred and fifty dollars and seventy-six cents..... $1,250.76

13,458.33

110 On the above-stated sum of $13,458.33 the claimants are entitled to interest from February 1, 1876, the date at which the principal became due and payable, at the rate of three cents and sixty-five hundredths of a cent per centum (3.65%) per annum.

The stipulation referred to is filed herewith, marked Exhibit A, J. W. A., referee.

Respectfully submitted.

(Signed) JOHN W. ANDERSON, *Referee.*

111 *Judgment entered June 22, 1896.*

At a Court of Claims held in the city of Washington on the 22d day of June, 1896, judgment was ordered to be entered as follows in the consolidated cases of Columbus J. Eslin, admr. of Daniel A. Connolly, dec'd, vs. District of Columbia, No. 375; Samuel J. Ritchie vs. Same, No. 150; Harriet T. Galt, exrx. of William M. Galt, dec'd, vs. Same, No. 162; William A. Gordon and J. Holdsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green vs. Same, No. 280.

The court, upon due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said Columbus J. Eslin, as administrator of Daniel A. Connolly, deceased, do have and recover the sum of four thousand eight hundred and forty-one dollars and twenty-six cents ($4,841.26); that the said Samuel J. Ritchie do have and recover the sum of five thousand three hundred and thirty-nine dollars and thirty cents ($5,339.30); that the said Harriet T. Galt, as
112 executrix of William M. Galt, deceased, do have and recover the sum of two thousand and twenty-seven dollars and one cent ($2,027.01); and that William A. Gordon and J. Holdsworth Gordon, as executors of Osceola C. Green, surviving partner of Downman & Green, do have and recover the sum of one thousand two hundred and fifty dollars and seventy-six cents ($1,250.76), amounting in all to the sum of thirteen thousand four hundred and fifty-eight dollars and thirty-three cents ($13,458.33), upon debts of the District of Columbia due and payable February 1, 1896, within the intent and meaning of the act of February 13, 1895.

BY THE COURT.

113 *Defendant's application for appeal.*

Dec. term, 1895–96.

COLUMBUS J. ESLIN, ADMINISTRATOR OF Daniel A. Connolly, *vs.* THE DISTRICT OF COLUMBIA.	No. 375.	Consolidated.
SAMUEL J. RICHIE *vs.* THE DISTRICT OF COLUMBIA.	No. 150.	
HARRIET T. GALT, EXECUTRIX OF William M. Galt, *vs.* THE DISTRICT OF COLUMBIA.	No. 162.	
WILLIAM A. GORDON AND J. Holdsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, *vs.* THE DISTRICT OF COLUMBIA.	No. 280.	

From the judgment rendered in the above-entitled causes, consolidated on the 22nd day of June, 1896, in favor of claimants, the defendant, by the Attorney-General, on the 3rd day of September, 1896, makes application for and gives notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Assistant Attorney-General.

Filed September 3, 1896.

114 In the Court of Claims.

COLUMBUS J. ESLIN *vs.* THE DISTRICT OF COLUMBIA.	No. 375, D. C.
S. J. RITCHIE *vs.* THE DISTRICT OF COLUMBIA.	No. 150, D. C.
H. T. GALT, EXRX. OF W. M. GALT, *vs.* THE DISTRICT OF COLUMBIA.	No. 162, D. C.
W. A. GORDON AND J. H. GORDON, executors of O. C. Green, *vs.* THE DISTRICT OF COLUMBIA.	280, D. C.

Motion for a new trial.—Filed Feb'y 25, 1897.

Now comes defendant, The District of Columbia, by the Attorney-General of the United States, and moves the court to set aside the judgment entered in this cause on the 22nd day of June, A. D. 1896, and to grant a new trial herein for the following reasons, viz:

I.

For error in the court in this: That the court gave judgment for
115 claimants, Columbus J. Eslin, S. J. Ritchie, H. T. Galt, admrx. of W. M. Galt, Wm. A. Gordon and J. H. Gordon, admrs. of O. C. Green, as due and payable February 1st, 1876, the effect of which was to give interest upon the amount of said judgment from that date, whereby great wrong and injustice was done to the United States and the District of Columbia.

II.

For error in the court in adjudging that the amounts allowed became due and payable before the granting of the judgment herein, whereby wrong and injustice was done to the United States and the District of Columbia.

J. E. DODGE,
Assistant Attorney-General.

JANUARY 15, 1900.

Ordered that the foregoing motion for new trial in these cases be overruled.

BY THE COURT.

116 In the Court of Claims.

Term 1899–1900.

Motion for allowance of appeal, March 1, 1900.

COLUMBUS J. ESLIN, ADMINISTRATOR OF Daniel A. Connolly,
v.
THE DISTRICT OF COLUMBIA. } No. 375.

Consolidated with

SAMUEL J. RITCHIE
v.
THE DISTRICT OF COLUMBIA; } No. 150.

HARRIET T. GALT, EXECUTRIX OF WILLIAM M. GALT,
v.
THE DISTRICT OF COLUMBIA; } No. 162.

WILLIAM A. GORDON AND J. HOLDSWORTH GORDON, executors of Osceola C. Green, surviving partner of Downman & Green.
v.
THE DISTRICT OF COLUMBIA. } No. 280.

Motion for allowance of appeal.

Now comes the District of Columbia, by the Attorney-General of the United States, and prays for the allowance of the appeal heretofore applied for from the judgment of the court rendered herein on the 22d day of June, 1896.

L. A. PRADT,
Assistant Attorney-General.

MARCH 1, 1900.

Ordered that this application for appeal be now allowed as prayed for.
BY THE COURT.

117 Court of Claims.

COLUMBUS J. ESLIN, ADMR. OF DANIEL A. CONNOLLY, deed., *vs.* DISTRICT OF COLUMBIA, } 375.

Consolidated with

SAMUEL J. RITCHIE *vs.* DISTRICT OF COLUMBIA; } 150.

HARRIET T. GALT, EXECUTRIX OF WILLIAM M. GALT, deed., *vs.* DISTRICT OF COLUMBIA; } 162.

and

WILLIAM A. GORDON AND J. HOLDSWORTH GORDON, executors of Osceola C. Green, surviving partner of Downman and Green, *vs.* DISTRICT OF COLUMBIA. } 280.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of pleadings in the above-consolidated cases; of the findings of fact and conclusions of law filed by the court; of the opinions of the court; of motions for new trial, and the ruling of the court thereon; of the judgment of the court; of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 29 day of March, A. D. 1900.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No., 17698. Court of Claims. Term No., 237. The District of Columbia, appellant, vs. Columbus J. Eslin, administrator of Daniel A. Connolly, deceased, et al. Filed March 30, 1900.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 237.

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
COLUMBUS J. ESLIN, ADMINISTRATOR OF Daniel J. Connolly, deceased;

and

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
SAMUEL J. RITCHIE;

and

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
HARRIET T. GALT, ADMINISTRATRIX OF William M. Galt;

and

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
WILLIAM A. GORDON AND I. HOLDSworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

Under the provisions of the act of Congress of February 21, 1871, ch. 62, sec. 37 (16 Stat. L., 427), Daniel

A. Connolly had eleven contracts with the District of Columbia for the improvement of the streets of Washington. On the 2d day of April, 1883, he filed his original petition, claiming that he was entitled to recover a large amount due upon such contracts. This petition, as finally amended, standing in the name of Columbus J. Eslin, as administrator, states his causes of action against the District, upon contracts numbered 209, 231, 1035, 243, and extensions, 349, 595, 1057½, 665, 690, 828, and 1028.

Prior to the bringing of this suit, however, three several suits were brought by parties claiming to be assignees of Connolly, as follows: By Downman & Green, by petition filed December 15, 1880, claiming to be assignees of balances due upon contracts 243 and 1028; by William M. Galt, by petition filed November 26, 1880, claiming to be assignee of balances due under contract 243; Samuel J. Ritchie, by petition filed November 20, 1880, claiming, as assignee, to be entitled to balances due under contracts 243 and 1028. By order of the Court of Claims these several suits were consolidated and tried as one case (Record, pp. 15, 17, 6). Connolly died, and that suit progressed in the name of his administrator, Columbus J. Eslin. Downman died, and that suit progressed in the name of Osceola C. Green, as surviving partner. The cases having come on for trial and been heard on the 31st day of October, 1887, judgments therein were entered as follows: In the case of Columbus J. Eslin, administrator of Connolly, upon petition of the claimant and the counterclaim of the defendant, the court finds, upon the whole

case, that the claimant is indebted to the defendant in the sum of $658.05, and do order, adjudge, and decree that the defendant, the District of Columbia, do have and recover of and from the said Columbus J. Eslin, as administrator of Daniel A. Connolly, deceased, the sum of $658.05.

In the other suits, the suits of the three assignees, the court ordered, adjudged, and decreed that the several petitions be dismissed.

At the same term of court all the claimants in these consolidated cases filed motions for new trials. These motions set up substantially the same grounds.

On the 7th day of November, 1889, the death of William M. Galt was suggested, and that suit revived in the name of Harriet T. Galt, as executrix.

The motions for new trials were not disposed of until November 13, 1893, when the following order was made by the court: "That the motions of the claimants for new trials in these cases be allowed under the terms of the order of the court this day filed;" which order provides: "As to the allegations made by way of counterclaim, the affirmative is on the defendants. Leave is given both parties to take further testimony, which shall be closed January 31, and the cases shall be put upon the February term calendar." The consolidated cases were again heard and decided on the 28th day of May, 1894. Findings of fact and opinion by Judge Davis were filed. (Record, pp. 28 to 48). The findings of fact, although fuller, are substantially—almost entirely—the same as the findings in

the case decided October 31, 1887, as stated in the report of the case in 22 Court of Claims, ——, and in the opinion of Judge Scofield, delivered at that time. (Record, pp. 18–20). The judge, delivering the opinion of the court in the case last decided, stated at the close thereof: "During the trial it was stated that all the questions between the different assignees were reserved. Judgment will therefore be suspended." (Record, p. 48.)

Nothing further was done in these claims until after the passage of the act of February 13, 1895, which is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in the adjudication of claims brought under the provisions of the act entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," approved the sixteenth of June, eighteen hundred and eighty (Twenty-first Statutes at Large, page two hundred and eighty-four), the Court of Claims shall allow the rates established and paid by the board of public works, and whenever said rates have not been allowed the claimant or his personal representtive shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause.

A new trial was allowed to these claimants under this statute. The consolidated cases were sent to a

referee to take and state the accounts between the claimants and the District under the contracts set forth in the petitions. The referee made his report under the said act of 1895. The defendant filed exceptions to the same. On June 22, 1896, the court overruled the defendant's exceptions and confirmed the report, and adopted the same as the findings of the court, and also found that the distribution of the amount found due, to wit, $13,458.33, as agreed upon by and between the claimants as stated by the referee in his report, the court adopts.

The court then stated the following conclusions of law (Rec., p. 49):

> Upon the facts stated in the referee's report the court, under the act of February 13, 1895 (28 Stat. L., 664), and in accordance with the agreement of the parties, decides as conclusions of law as to the said sum of $13,458.33 so found due from the District of Columbia, that the several claimants named below each recover judgment against the United States (District of Columbia) in the amounts stated, viz:
>
> | | |
> |---|---|
> | In favor of Columbus J. Eslin, administrator of Daniel A. Connolly, cause No. 375 | $4,841.26 |
> | In favor of Samuel J. Ritchie, cause No. 150 | 5,339.30 |
> | In favor of Harriet T. Galt, executrix of William M. Galt, cause No. 162 | 2,027.01 |
> | In favor of William A. Gordon and J. Holdsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, cause No. 280 | 1,250.76 |
> | Amounting in all to | 13,458.33 |

which said sum, and as well the several amounts composing the same, were due and payable February 1, 1876. (Record, pp. 48–66.)

Whereupon the court entered this judgment:

At the Court of Claims held in the city of Washington on the 22d day of June, 1886, judgment was ordered to be entered, as follows, in the consolidated cases of Columbus J. Eslin, administrator of Daniel A. Connolly, deceased, against the District of Columbia, No. 375; Samuel J. Ritchie against the same, No. 150; Harriet T. Galt, executrix of William M. Galt, deceased, against the same, No. 162; William A. Gordon and J. Holsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, against the same, No. 280.

The court, upon due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said Columbus J. Eslin, as administrator of Daniel J. Connolly, deceased, do have and recover the sum of $4,841.26; that the said Samuel J. Ritchie do have and recover the sum of $5,339.30; that the said Harriet T. Galt, as executrix of William M. Galt, deceased, do have and recover the sum of $2,027.01; and that William A. Gordon and J. Holdsworth Gordon, as executors of Osceola C. Green, surviving partner of Downman & Green, do have and recover the sum of $1,250.76, amounting in all to the sum of $13,458.33, upon debts of the District of Columbia due and payable February 1, 1876, within the intent and meaning of the act of February 13, 1895. (Record, p. 66.)

The several amounts recited in this judgment were apportioned under the stipulation entered into by and between the attorneys for the original claimant and the several assignees herein mentioned, included in the report of the referee and made a part of the conclusion of law of the court in the consolidated cases. (Record, pp. 49, 64, 65, 66.)

From this judgment the defendant made application for and gave notice of an appeal to the Supreme Court on the 3d day of September, 1896. On February 25, 1897, a motion for new trial was made by defendant, which motion was overruled on January 15, 1900. On March 1, 1900, the appeal to the Supreme Court from the judgment of June 22, 1896, was allowed.

After the judgment of June 22, 1896, and the notice of appeal, but before the perfection of the appeal, by act of Congress "making appropriations for the District of Columbia," approved March 3, 1897 (29 Stat. L., 665, 669), it was enacted:

> That the act approved February thirteenth, eighteen hundred and ninety-five, entitled "An act to amend an act entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction upon the Court of Claims to hear the same, and for other purposes,' approved June sixteenth, eighteen hundred and eighty," be, and the same is hereby, repealed, and all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said act shall be paid.

The Court of Claims, on the 8th day of March, 1897, made the following order:

> The act of 13 February, 1895 (28 Stat. L., p. 664), having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments, and all other papers in such suits be restored to and retained upon the files of the court without further proceedings being had.

In the opinion of the court at the first trial of the cause, delivered by Judge Scofield, it is said:

> By a careful comparison of the dates of the papers under which the rights of the claimants in cases Nos. 150, 162, and 280 originated with the dates of the overpayments, it appears that Connolly, during all that time, was indebted to the District. It is true that, upon the settlement of the same, all the assigned contracts' balances are now found to have been due to Connolly, but these balances could not be assigned so as to escape the set-off of balances then existing on other contracts in favor of the District.
>
> In cases Nos. 150, 162, and 280 the petitions are dismissed, and in No. 375 judgment will be entered in favor of the defendant in the sum of $658.05. (Record, p. 20.)

Nos. 150, 162, and 280 were the cases brought by the assignees. No. 375 was the case of the original claimant, Connolly.

In the opinion of the court at the second trial of these cases it is stated as follows:

> We now again hold that the District can recover back the overpayment; but this only as to Connolly, the contractor.
>
> Otherwise is it as to his assignees; between Connolly and the defendants it may be well enough to make a general account covering all his contracts, and, after striking a balance, to cause the defendant to pay the sum due him or to authorize the defendant to recover the sum due from him as the results may be in Conolly's favor or against him. But an assignee of the contract which is profitable can not be charged with his assignor's loss upon another entirely different and losing contract when, as in this case, he has furnished the money upon which the contract was completed with the knowledge of the defendant. The rights of Connolly's assignees are (under the assignment, of which defendant had notice) not to be confounded with Connolly's rights, or his duties, or his liabilities; if his assignees' assignment be of a profitable contract, upon which something now remains due and unpaid, recovery can not be defeated upon the fact that Connolly now owes the District upon another and losing contract with which the assignees are in no way connected. (Record, pp. 47, 48.)

The accounts between the parties before the act of 1895 are set out in the findings (22 C. Cls. R., 395–398) and in the opinion of the court (Record, p. 20). It is stated, in the opinion, as a finding of fact and conclusion of law:

> By a careful comparison of the dates of the papers under which the rights of the claimants

in cases Nos. 150, 162, and 280 originated, with the dates of the overpayments, it appears that Connolly during all that time was indebted to the District. It is true that upon a settlement of some of the assigned contracts balances are now found to have been due to Connolly, but these balances could not be assigned so as to escape the set-off of balances then existing on other contracts in favor of the District.

The assignments are confined to the contracts Nos. 243 and extensions and 1028. There is nothing in the findings of fact made at the second trial of the cause differing from the above statement.

The assignment from Connolly to Galt was made after all the work was completed under these contracts. (Record, p. 36, Finding V, p. 39, Finding XI.)

The interest of Downman & Green, if they had any, was assigned to Ritchie after the work on all the contracts sued on had been performed (Record, p. 45), and during all the time of the powers of attorney and agreements from Connolly to Downman & Green, found in the Record, p. 42–45, Connolly was indebted to the District. (Record, p. 20.)

It was contended in the court below, and will be so contended here, by counsel for the assignees, who were claimants in three of the cases consolidated, that the judgment entered on the 22d day of June, 1896, was the final completed judgment in the case, which had been suspended by the order of May 28, 1894, and that they were entitled to recover the amounts awarded to them in that judgment, notwithstanding the terms of the repealing act of 1895.

This question of law was not passed upon by the court below. In truth, it was not directly presented to that court except in argument.

ASSIGNMENT OF ERRORS.

I. The court erred in rendering the judgment of the 22d day of June, 1896, in favor of the claimants.

II. The court erred in finding that the District of Columbia is indebted to Columbus J. Eslin, the original contractor in these cases, or his legal representatives, for labor done and materials furnished to the said District, at board rates, under the contracts mentioned in the aggregate sum of thirteen thousand four hundred and fifty-eight dollars and thirty-three cents.

III. The court erred in finding the several assignees whose cases were consolidated with the case of the original contractor were entitled to judgment in the sums reported by the referee with interest from February 1, 1876.

IV. The court erred in these conclusions of law:

> We now again hold that the District can recover back the overpayment; but this only as to Connolly, the contractor.
>
> Otherwise is it as to his assignees; between Connolly and the defendants it may be well enough to make a general account covering all his contracts, and, after striking a balance, to cause the defendant to pay the sum shown due him, or to authorize the defendant to recover the sum due from him as the result may be in Connolly's favor or against him. But an assignee of a contract which is profitable can not be charged

with his assignor's loss upon another—entirely different and losing—contract, when, as in this case, he has furnished the money upon which the contract was completed, with the knowledge of the defendant. The rights of Connolly's assignees, therefore, are (after the assignment of which defendant had knowledge) not to be confounded with Connolly's rights or his duties or his liabilities; if his assignees' assignment be of a profitable contract upon which something now remains due and unpaid, recovery can not be defeated by the fact that Connolly owes the District for overpayment upon another and losing contract with which the assignees are in no way connected.

ARGUMENT.

If the judgment rendered in this case on the 22d day of June, 1896, is a final judgment under the act of February 13, 1895 (28 Stat. L., 264), I admit the appeal is not properly taken, because by the repealing act of March 3, 1897 (29 Stat. L., 665, 669), all proceedings pending under the act of 1895 were vacated and no judgments rendered in pursuance of that act could be paid. The report of the referee, adopted and made the findings of facts, states that the account was stated under the act of 1895. (Record, p. 50.) The accounts are stated separately under the contracts set forth in the petition. Except for the provisions of the statute authorizing the allowance of board rates there is no doubt that Connolly was indebted to the District. There was then no $13,000 to be divided, so that upon

that basis the apportionment to the assignees could not be made.

It was, however, urged upon the court below that the claims of the assignees were based upon and supported by written contracts fixing a price for the work; that the judgments were based upon contract prices; that the rights of the assignees were based upon the contracts recited in the instruments of assignments, and were wholly independent of the transactions between Connolly and the district under other and independent contracts. They claimed that therefore their judgments rested upon the original contracts between Connolly and the district, and were valid and correct under the act of 1880.

The court stated no conclusions of law upon these questions to support the judgment. They were raised upon the argument of the motion for new trial, although that motion was really founded upon the decision in *The District of Columbia* v. *Johnson* (165 U. S., 330). The appeal, although applied for, had not yet been prosecuted to allowance. It was allowed March 1, 1900.

The cases appealed from were consolidated and tried together as one case, by orders of the court, under the provisions of section 2 of the act of June 16, 1880:

> When the validity of a number of claims depends substantially upon a like state of facts, they may be brought before the court in one petition in which all parties are joined, and may be tried together under such rules as the court may prescribe, and such judgment may be entered therein as the court may determine;

and cases of like kind may be consolidated and tried together whenever the court so orders.

The claims of the parties grew out of the contracts which Connolly had with the District for public works. There were sixteen of these contracts. The cases were sent to referees, who stated accounts upon each of the contracts, and made consolidated statements showing the condition of the final account between Connolly and the District. In the cases tried under the act of 1880, the court found that upon settlement of all the Connolly matters, Connolly was indebted, by reason of overpayments, to the District. (Rec., p. 20.)

In carrying on the public improvements in the District, out of which so much complication has arisen, assignments of certificates issued by the different boards and officials and of contracts and interests in contracts have been recognized by the Court of Claims. The act conferring jurisdiction on this court over outstanding claims specifies "certificates which may have been issued to the contractor *or his assignee;*" and provides (sec. 2) that the claims shall be prosecuted "by the contractor, his personal representatives, *or his assignee.*" These are the provisions by which the right to enforce the assignment of these *choses in action* is established and the assignee permitted to sue in his own name.

But the same statute, which is the statute of jurisdiction, contemplates the settlement of all the accounts between the contractors and the District by providing (sec. 2) that all the claims depending upon a like state of facts may be included in one suit and tried together;

and in section 3 it is made the duty of the Attorney-General to defend against said claims in like manner as he is now by law required to defend the United States, with the same power to interpose counterclaims and offsets, etc.

The defenses of counterclaims and offsets were provided for in sections 1059 and 1061, Revised Statutes.

The effect of these provisions of the statute of June 16, 1880, is to state the accounts of the contractor upon the original claims and any counterclaims and offsets, if any there be, and if there is a balance against him to render judgments for the District in that amount. If there is a balance in his favor, and there are assignees, judgment is given for the amount assigned to the assignees according to priority. This much was laid down in *Brown's Case* (17 C. Cls. R., 402), and has been adhered to.

The matter then concerns the assignees only. At the trial of the cases, the report of which is in 22 C. Cls. R., ——, the petitions of these assignees were dismissed (Rec., p. 20.) At the second trial no findings were found which would support a judgment for any or either of them. Everything was suspended. The findings in the last trial, under the act of 1895, would give certain amounts to these respective assignees; but the indebtedness of the District, whether to Connolly or the assignees, was upon the basis of board rates. The proceedings under the act of 1895 having been vacated, is there any fact in the record which would show the assignees entitled to the benefits of the judgment of

June 22, 1896? All the rights claimed arise under the contracts 243 and 1028.

At the the first trial the court found as follows:

On contract No. 243 and extensions there is due Connolly	$936.40
On contract No. 1028 there is due Connolly	1,645.09
	2,581.49

(Rec., p. 20.)

At the second trial the court did not find any definite amounts due upon either of these contracts, but left that question as it was before the granting of the motions for new trials.

How, then, with only $2,581.49 as due, the findings upon the offsets being excluded, could judgments aggregating $8,617.07 be correct?

But counsel insist their judgments are based upon contract prices, named in the written extensions of contract No. 243, as stated in the account made by the referee, Anderson (Rec., pp. 53–57); and they refer this finding back to the findings and conclusions as stated by Judge Davis in speaking for the court. But this can not be. The conclusion of law is stated thus: "As to this we can only repeat our former ruling herein, viz: This question has been so fully discussed in a recent opinion of the chief justice in the case of *Barnes* v. *The District of Columbia* (22 C. Cls. R., p. 366) that it is unnecessary to go over the ground again. We hold in these cases, as we held there, that these orders (of the board of public works) do not change 'the written contracts between the parties made before the orders were issued, and much less

contracts made thereafter.'" (Rec., p. 47.) This is from what was said by Judge Scofield, at the previous trial, in reference to this very contract. It is impossible to see, then, how the judgments for the amounts decreed can be sustained.

But the main dependence of these assignees to entitle them to recover at all is that the rights of these assignees are to be determined under these two contracts without reference to the obligations of Connolly under other and independent contracts.

This contention is certainly not intended to ignore entirely any consideration of the offsets or counterclaims pleaded in accordance with the express statute. It can only be maintained, if at all, upon the ground that the offsets must have arisen subsequent to the time of the notice of assignment.

I apprehend a very brief reference to the facts found will dispose of this argument, by showing that in no event can the principle apply to these assignees.

The papers relied upon to support the claim of Downman & Green are powers of attorney and agreements recited in full in the record (pp. 42–44). The first is dated December 1, 1874, and authorizes Downman & Green to sell and hypothecate, and sell so much of the bonds or certificates drawn under a power of attorney as may be necessary to reimburse them for all moneys advanced by them and for all proper costs, charges, and commissions, and upon the discharge of all such indebtedness and requires them to return and surrender and release the residue. The

power of attorney is to collect and receive all moneys, etc., arising from work done and to be done under contract No. 243. This power of attorney recites no consideration, but may be, and probably is, the power referred to in the memorandum.

The other agreements and powers of attorney are dated respectively May 25, 1875, July 31, 1875, and June 15, 1876. These contain as the consideration money advanced to carry on and complete certain contracts, and in the latter memorandum is recited: "Whereas the firm of Downman & Green, acting under a certain agreement with me, have from time to time advanced certain sums of money to me to be used in prosecution of certain contracts between me and the District of Columbia, which advances were made upon the terms set forth in said agreement; and whereas the said Downman & Green have at my request from time to time advanced other money to me for the payment of notes, interest, taxes, etc."

The court made a finding of fact that Downman & Green furnished the money to carry on contracts 243 and 1948. (This is an error, evidently, and refers to the file number of a letter in reference to work to be done by Connolly; but whether it embraced other contracts than 243 and 1028 does not appear.)

The court further finds:

> It does not appear that any settlement has ever been made by Downman & Green with Connolly, nor that any statement of advances and receipts by Downman & Green was ever

rendered to Connolly; it appears that Downman & Green made advances amounting in all to upward of $58,000, and that in February, 1876, their advances exceeded receipts in the sum of about $8,700. After this (July 9, 1880) Connolly revoked his powers of attorney to Downman & Green.

What part, if any, of the balance found due from Connolly to Downman & Green, for moneys advanced to carry on contracts 826 and 1028, is not found by the court.

In the first place, do these instruments constitute an equitable assignment which would authorize Downman & Green to sue for a balance due? Clearly not, unless the payments made under these contracts were made to Downman & Green; for, if Connolly retained any control over the fund—any authority to collect or any power of revocation—that is fatal to the claim of the assignee. (*Christmas* v. *Russell*, 11 Wall., 69.)

Under the instruments of December, 1874, he did both. They were merely agreements to pay out of a particular fund.

If Downman & Green did receive the certificates they have no cause of action, because evidence shows they were overpaid under the agreements with Connolly, and Connolly had revoked the powers of attorney before suit brought. After the several agreements and up to January 1, 1876, there were issued in certificates upon contract No. 243 and extensions about $70,000 (Record, p. 56). But Downman & Green's advances were only $58,000. If, therefore, under an

assignment, they received these moneys they were overpaid. The court make no finding.

But under the counterclaims: At the time of the first power of attorney Connolly was largely indebted to the District for overpayments made December 31, 1873.

At the time of the second power of attorney all the overpayments to Connolly had been made. (Record, p. 20.) The work under the extensions to contract No. 243, was all done after the time of the overpayments.

The applicable rule of law is a simple one. If a man takes an assignment of a *chose in action* he must take his chance as to the exact condition in which the party giving it stands. (*Mangles* v. *Dixon*, 3 H. L. C., 735.)

Ritchie's claim arises under an assignment from Downman & Green, dated the 11th day of February, 1878. He stands, therefore, in the precise condition of Downman & Green.

Galt's assignment is of a definite amount due for work claimed to have been done under the extensions of contract No. 243. It is directly from Connolly, and was executed long after all the work had been completed. What we have said above applies to his claim.

I have not lost sight of the contention of the claimant that, although it may be true that Connolly was a debtor to the District, yet this was a matter afterwards ascertained; that by the action of the agents and officers of the defendant it appeared at the time of the

assignment that the District was indebted to Connolly, not only in the amount stated in the assigned voucher, but in other amounts; and that, therefore, the creator of this security, having misled the assignee, was liable to him.

There are several answers to this. This is not in the nature of false information, as it might be in the case of an individual debtor. It has been decided that the supposed indebtedness to Connolly arose from illegal allowances made by the agents of the District. If this was a mistake of law, it was such a mistake as everybody was bound to take notice of. If the officers exceeded their authority, the Government can not be held liable. (*United States* v. *Kirkpatrick*, 9 Wh., 720; *United States* v. *The Bank of the Metropolis*, 15 Pet., 377; *McElrath* v. *The United States*, 12 C. Cls. R., 201, 217; 102 U. S., 426; *Pierce* v. *United States*, 7 Wall., 666.)

But this court has repeatedly held that this was more money thus paid than could be recovered back in a suit brought by the contractor or his representative to settle mutual accounts under the provisions of the statutes of counterclaim.

The assignee stands in the place of the assignor—entitled to the same rights, but no other. His right is subject to the qualification that the debtor may offset any claim or make any other equitable defense in a suit by the assignee which he might have done had it been brought by the assignor. (*Hilliard on Sales*, 452; *Sanborn* v. *Little*, 3 N. H., 539; *Shapley* v. *Bellows*, 4

N. H., 352; *Briggs* v. *Dorr*, 19 Johns., 95; *Green* v. *Hatch*, 12 Mass., 195.) The statute is affirmative of this equitable doctrine.

ROBERT A. HOWARD,
United States Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

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No. 36.

Reply Brief of the Atty. Gen. [illegible] Howard for the Appl

Office Supreme Court U. S.
FILED
OCT 18 1901
JAMES H. MCKENNEY
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Oct. 18, 1901.

No. 36.

THE DISTRICT OF COLUMBIA, APPELLANT,
v.
COLUMBUS J. ESLIN, ADMINISTRATOR OF Daniel J. Connolly, deceased;
and
THE DISTRICT OF COLUMBIA, APPELLANT,
v.
SAMUEL J. RITCHIE;
and
THE DISTRICT OF COLUMBIA, APPELLANT,
v.
HARRIET T. GALT, ADMINISTRATRIX OF William M. Galt;
and
WILLIAM A. GORDON AND HOLDSWORTH Gordon, executors of Osceola C. Green, surviving partner of Downman & Green.

REPLY BRIEF FOR THE UNITED STATES.

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REPLY BRIEF FOR THE UNITED STATES.

ARGUMENT.

It is stated in the brief filed herein by Eslin, administrator of Connolly (p. 8):

> After the passage of the latter act (the act repealing the act of February 13, 1895), a

> motion for new trial came on to be heard before the Court of Claims, who, after hearing the same, on the 15th of January, 1900, overruled the motion.
>
> By this action the judgments rendered June 22, 1896, were in effect held to be good and valid judgments against the District of Columbia under the act of June 16, 1880 (21 Stat. L., 284), which originally conferred jurisdiction of this class of cases upon the Court of Claims.

In the brief for Galt it is stated (p. 6):

> On the 15th of January, 1900, the court entered an order overruling the motion for new trial (p. 68). In view of its order that no proceedings should be had on motions for new trial, this was equivalent to a decision that the judgments were not entered under that act but under the act of June 16, 1880.

This is the contention of all the claimants; and was urged in argument in the Court of Claims. But that court overruled the motion, without opinion, and afterwards allowed the appeal.

The judgment of June 22, 1896, recites: "The court, upon due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said (naming the several claimants) have and recover (naming the several amounts), amounting in all to the sum of thirteen thousand four hundred and fifty-eight dollars and thirty-three cents, upon debts of the District of Columbia, due and payable February 1, 1876, *within the intent and meaning of the act of February 13, 1895.*" (Tr., p. 66.)

These latter words of the judgment, though rather ambiguous, are clear when referred to the findings of the court and the conclusions of law. (Tr., p. 49.)

> These cases coming on to be heard on the defendant's exceptions to the referee's report, the court, after hearing the argument of counsel and being advised in the premises, overrules the defendant's exceptions thereto and confirms said report, and adopts the same as the findings of the court. The distribution of the amount found due, to wit, $13,458.33, as agreed upon by and between the claimants, as stated by the referee in his report, the court adopts.
>
> Upon the facts stated in the referee's report the court, under the act February 13, 1895 (28 Stat. L., 664), and in accordance with the agreement of the parties, decides as conclusions of law as to the said sum of $13,458.33, so found due from the District of Columbia that the several claimants named below each recover judgment against the United States (District of Columbia) in the amounts stated (here follow the names of all the claimants and the several amounts, following the report of the referee). (Tr., pp. 50–66.)

If the judgment is a final judgment under the act of 1895, all pending proceedings were vacated, the appeal should not have been perfected, and the judgment can not be paid.

But if it is a judgment which was suspended on May 28, 1894 (Tr., pp. 28, 48), it is clearly erroneous. I will briefly review the cases of each of the claimants, as presented by their counsel.

The account of Connolly with the District, under the several contracts sued on, is stated by Judge Schofield as the finding of the court on the first trial (Tr., p. 20): A balance is found due the District of $658.05.

Brown et al. v. *District of Columbia* (17 C. Cls. R., 303) was where assignees had brought suits upon claims. The cases were consolidated and, upon hearing, it appeared to the court there were other outstanding cases founded on the transactions of the same assignor, and that he was not a party to any of the proceedings. Upon motion of the defendant, the court ordered that Finley be made a party, and that all the causes be consolidated, so that hearing could be had upon the claims and set-offs pleaded by defendant. It was decided that the act of 1880 conferred on the court ample power to bring matters in controversy in District suits to one trial and final adjudication. Afterwards the cases were heard on the merits (17 C. Cls. R., 402). The set-offs were for improper allowances and payments by the board of audit. They were sustained. The court said:

> The District was indebted to Finley for work on Virginia avenue a balance of $10,965.89. Finley was indebted to the District in the sum of $8,543.18 for money paid to him without consideration and in mistake of facts, and which he had not in equity and good conscience any right to retain.
>
> The claimants appeal to the equity jurisdiction conferred upon the court by the act of

> June 16, 1880, but that is not favorable to their demands. One of the first principles of equity jurisprudence is that he who seeks equity must do equity. To allow Finly to recover from the District without deducting from his claim what he had already received in overpayments and without consideration would be a palpable violation of that fundamental maxim.

This has been the invariable mode of procedure in all these cases in the Court of Claims. The proposition of law has been undeviatingly adhered to (*Barnes* v. *District of Columbia*, 22 C. Cls. R., 366).

It is urged that the set-offs can not be allowed because the statute "made payments to a contractor through this board of audit conclusive." But this court has determined this very matter. (*McElrath* v. *United States*, 102 U. S., 426, 441.) And in *District of Columbia* v. *Cluss* (103 U. S., 900), the court said: "That board (the board of audit) was not a judicial body whose action was final; it exercised little more than the functions of an accountant. A claim allowed by it was not necessarily a valid one; a claim disallowed was not, therefore, illegal."

The section that "no claim shall be prosecuted or considered by the Court of Claims under the provisions of this act which was rejected by the board of audit," is simply an exclusion of such a case from the jurisdiction of the court. (*Brown* v. *District of Columbia*, 127 U. S., 579, 589.)

There was no submission to arbitration of the matters in dispute between the contractor and the

District, nor an award which was conclusive upon the parties. (Tr., p. 33.) The Court of Claims says upon this point:

> There is no dispute as to the amount of work done. The point is that Connolly was allowed board of works rates instead of contract rates in this payment. We do not consider that the referee's report (and we have no other evidence) shows a submission to an arbitration which could produce an award binding and conclusive upon the District, or that the decision of these commissioners effected such a settlement as amounts in law to an accord and satisfaction. On the contrary, this report, in our opinion, simply shows a payment made upon the statement of adjusters appointed in the course of business, prepared upon the assumption that Connolly should be allowed board rates and not contract rates, an assumption held by this court to be unwarranted. (Tr., p. 47.)

Consequently no judgment in favor of Connolly could be given under the statement of the accounts above alluded to (Tr., p. 20); but the overpayments, it is said, were erroneously charged under contract No. 243. We can not go behind the findings. In the first case the court said (Tr., p. 18):

> The original contract, No. 243, stipulates that the price of grading shall be 30 cents a cubic yard, including 200 feet of "haul," and all hauling beyond that 1 cent for every 200 feet. As the work progressed partial measurements and payments were made from time to time at these rates. Subsequently, beginning

with December 5, 1873, are four partial measurements, on which the extra haul was reckoned at 1¼ cents for every 100 feet. This change in reckoning makes a difference in favor of the claimant of $8,413.55. The computation was made by the district auditor or engineer, and the three last payments made through the board of audit.

The change in the rate of payment was doubtless made in pursuance of two orders by the board of public works—reciting them;

and there is no different fact in the findings at the second trial. (Tr., Finding IV, pp. 30–34.)

The only other overpayment charged to the contractor, complained of is under contract 690. The measurement of the work done was upon five blocks; but two of these were designated in the contract. The contractor was paid for all the work at board rates. The court has allowed "board rates" for the work done on the blocks outside of the contract, but has charged Connolly with the excess over contract price paid for work done under the contract. This was at least as favorable to the contractor as he could expect.

EXECUTORS OF SURVIVING PARTNER OF DOWNMAN & GREEN.

I do not deem it necessary to go into the examination of whether these instruments recited in Finding XV (Tr., pp. 42–44) constituted valid assignments of the moneys falling due under contracts Nos. 243 and 1028. If they are established in all the integrity claimed for them, it would be necessary to have an

accounting between Connolly and the assignees before the liability of the debtor could be ascertained. This was not done. And all powers of attorney to Downman & Green were revoked July 9, 1880 (Tr., p. 44). (*Christmas* v. *Russell*, 14 Wall., 69; *Baker* v. *Wood*, 157 U. S., 212.)

But Downman & Green took subject to all equities between the original assignor and the debtor. The court said (Tr., p. 20):

> By a careful comparison of the dates of the papers under which the rights of the claimants in cases Nos. 150, 162, and 280 originated, with the dates of the overpayments, it appears that Connolly during all that time was indebted to the District. It is true that upon a settlement of some of the assigned contracts balances are now found to have been due to Connolly, but these balances could not be assigned so as to escape the set-off of balances then existing on other contracts in favor of the District.

There are other reasons why the representatives of Downman & Green could not recover under these assignments, showing that the original findings were correct. There is nothing in the later findings at variance with these, nor do I see that the rule laid down in the opinion of Judge Davis (Tr., p. 48), when applied to the facts, in the slightest degree sustains the conclusions of the assignees. That learned judge expressly confines the rights of the assignees to the time of notice.

The assignments were under contracts Nos. 243 and 1028. All the overpayments were properly charged,

as we have seen, under contract 243. The court so finds (Tr., pp. 18, 33, 34). Now, if these powers of attorney and agreement set out in Finding XV (Tr., pp. 42–44) were effectual and operative, two things are clear: First, that Downman & Green took subject to the right of the District to set off overpayments made prior to the assignments; second, that, after the assignments, if overpayments were made they were made to them, and therefore their claim is subject to the set-off. So in the settlement of this contract the times of overpayments are immaterial.

But there is a balance of $936.40 due to Connolly or his assignees. This balance is "on contract No. 243 and extensions, with the Hussey assignment" (Tr., p. 20). The work embraced in the Hussey assignment was not done under contract 243 at all. It is not embraced in that contract. It was not considered by Connolly as coming within the Downman & Green papers. It was the subject of another assignment, made to Galt. It amounted to $2,327. Excluding it from the 243 settlement there is nothing left for Downman & Green. A slightly different state of facts exists as to No. 1028, the other contract embraced, presumably, in the power of attorney of May 25, 1875. All the overpayments to Connolly, under contracts Nos. 595, 1037, 665, and 690, which are the subjects of set-off, were made prior to the date of this assignment. The power of attorney and agreements claimed to be this assignment were dated, respectively, May 25 and July 31, 1875. (Tr., p. 43.) The overpayments were made January 27, 1875, February 9,

1875, December 31, 1873. (Tr., p. 20.) Downman & Green took their assignment subject to these amounts as set-offs.

Under the facts, as found by the court, the petition of Downman & Green was properly dismissed. When the motion for a new trial was granted November 13, 1893, this order was made (Tr., p. 27):

> Ordered, That the motions of the claimants for new trials in these cases be allowed under the terms of an order of the court this day filed, which order provides: As to the allegations made by way of counterclaims the affirmative is upon the defendants. Leave is given both parties to take further testimony, which shall be closed January 31, and the case shall be put upon the February trial calendar.

The facts as to the counterclaims were found at the second trial substantially as at the first.

SAMUEL J. RITCHIE.

The assignment to Ritchie was made February 11, 1878, and was from Downman & Green. (Tr., p. 45.) He took what they had and nothing more.

ADMINISTRATRIX OF GALT.

Galt's assignment was dated July 31, 1876. As before noticed, it was for money due for work which was not included in any of Connolly's contracts, but which was done by him and, by agreement of all parties concerned, he was to have credit for. The calculations were based upon board rates. But at the time of this assignment all work had been concluded

upon all the contracts and Connolly was indebted to the District. There was nothing due to Connolly, and Galt took nothing.

Respectfully submitted.

LOUIS A. PRADT,
Assistant Attorney-General.

ROBERT A. HOWARD,
Special Assistant U. S. Attorney.

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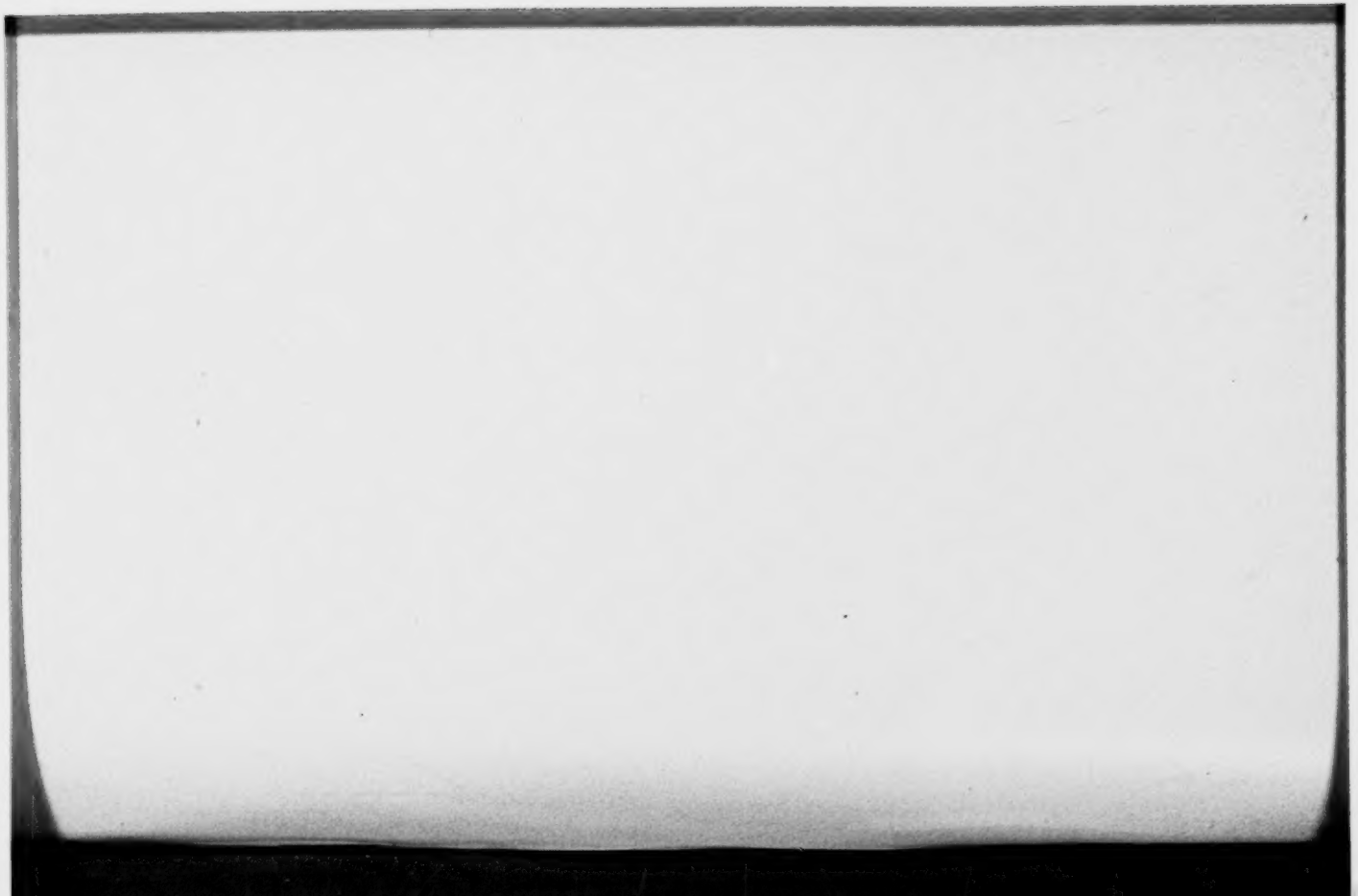

IN THE

Supreme Court of the United States.

October Term, 1900.

THE DISTRICT OF COLUMBIA, *Appellant*,

v.

COLUMBUS J. ESLIN, Administrator of DANIEL A. CONNOLLY, Deceased,

SAMUEL J. RITCHIE,

HARRIET T. GALT, Executrix of WILLIAM M. GALT, Deceased, and

WILLIAM A. GORDON and J. HOLDSWORTH GORDON, Executors of OSCEOLA C. GREEN, surviving partner of DOWNMAN & GREEN.

No. 237.

BRIEF OF ARGUMENT FOR HARRIET T. GALT, EXECUTRIX OF WILLIAM M. GALT.

I. STATEMENT OF THE CASE.

1. History of the Litigation.

This appeal is taken by the District of Columbia from four separate judgments rendered against it by the Court of Claims upon suits brought by the administrator of Daniel A. Connolly, deceased, and by three assignees of Connolly respectively.

Daniel A. Connolly was during his lifetime a large contractor with the District government, first under the Board of Public Works and then under the Commissioners of the District of Columbia.

The act which first granted jurisdiction to the Court of Claims of claims arising out of contracts with the District of Columbia was that of June 16, 1880, 21 Stat. L. 284. By section 2 of that act, it was, among other things, provided (p. 285):

"That the prosecution of all such claims shall be commenced in the Court of Claims by the filing of the petition of the claimant, as required by the rules and practice of said court, within six months from the passage of this act; and all such claims against the District of Columbia now existing, and not so filed within said time shall be forever barred," etc.

Within the six months thus limited petitions were filed respectively by Rawleigh W. Downman and Osceola C. Green (Record, pp. 4–6); William M. Galt (pp. 6–14) and Samuel J. Ritchie (pp. 15–17), all claiming to be assignees under one or several of Connolly's contracts. Neither Connolly, nor his legal representative, appeared within the time limited by the original act of 1880.

By a provision in the District of Columbia Appropriation Act of March 3, 1883, 22 Stat. L. 469, the time for filing such claims was extended for thirty (30) days from and after the approval of the act. On the last of the thirty (30) days thus allowed, viz., April 2, 1883, a petition was filed (Record, pp. 1–3) by Columbus J. Eslin, administrator of Daniel A. Connolly, the original contractor, followed successively by two amended petitions; wherein, disregarding all the assignments set up by the other parties, the administrator claimed to recover on ten (10) different contracts balances aggregating thirteen thousand two hundred and seventy-eight dollars and twenty-one cents ($13,278.21).

From time to time during the progress of the cases several of the parties died and their respective legal representatives were substituted. The cases were consol-

idated for trial (p. 15). Upon the first hearing the court found balances on several contracts to be due to the contractor, aggregating two thousand eight hundred and twenty-eight dollars and eighteen cents ($2,828.18). It also found overpayments on other contracts amounting to three thousand four hundred and eighty-six dollars and twenty-three cents ($3,486.23), leaving a balance in favor of the District of six hundred and fifty-eight dollars and five cents ($658.05) (Record, p. 20). It therefore dismissed the petitions of the three assignees, and entered judgment in favor of the District of Columbia against Columbus J. Eslin as administrator of Daniel A. Connolly, the contractor, for the balance found due—six hundred and fifty-eight dollars and five cents ($658.05) (Record, pp. 20, 21). The opinion of the court was delivered by the late Judge Scofield, October 31, 1887 (pp. 18–20).

All the claimants thereupon seasonably filed their several motions for new trial, alleging various errors of fact and law (pp. 21–27).

On the 13th of November, 1893, the court made an order granting the motions for new trial, giving leave to the parties to take further testimony and ordering an early trial of the case (p. 27).

On the 28th of May, 1894, new findings of fact were entered (pp. 28–46). The opinion of the court was delivered by Judge Davis (pp. 28, 46).

The point in which the court varied its first ruling, allowing the counter-claims, is thus stated in the opinion (pp. 47, 48):

"We now again hold that the District can recover back the overpayment; but this only as to Connolly, the contractor.

"Otherwise is it as to his assignees. Between Connolly and the defendant it may be well enough to make a general account covering all his contracts, and, after striking

a balance, to cause the defendant to pay the sum shown due him or to authorize the defendant to recover the sum due from him, as the result may be in Connolly's favor or against him. But an assignee of a contract which is profitable can not be charged with his assignor's loss upon another—entirely different and losing—contract, when, as in this case, he has furnished the money upon which the contract was completed, with the knowledge of the defendant. The rights of Connolly's assignees, therefore, are (after the assignment of which defendant had knowledge) not to be confounded with his rights or his duties or his liabilities; if his assignee's assignment be of a profitable contract upon which something now remains due and unpaid, their recovery can not be defeated by the fact that Connolly owes the District for overpayment upon another and losing contract with which the assignees are in no way connected."

At the close of the opinion it was stated (p. 48):

"During the trial it was stated that all questions between the different assignees were reserved. Judgment will therefore be suspended."

Thus matters stood when, February 13, 1895, Congress passed an act, 28 Stat. L. 664, by which it was provided that in the adjudication of claims brought under the provisions of the District Claims Act of June 16, 1880:

"The Court of Claims shall allow the rates established and paid by the board of public works; and whenever said rates have not been allowed the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this Act, to a new trial of such cause."

Thereupon the several claims were referred to a referee. He reported that he found that the allowance of board rates showed balances due upon the several contracts amounting to thirteen thousand four hundred and fifty-eight dollars and thirty-three cents ($13,458.33). By

stipulation among the several parties an apportionment of this amount among them was reached, and judgments were entered in their favor as follows (p. 66):

"The court, upon due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said Columbus J. Eslin, as administrator of Daniel A. Connolly, deceased, do have and recover the sum of $4,841.26;

"That the said Samuel J. Ritchie do have and recover the sum of $5,339.30;

"That the said Harriet T. Galt, as executrix of William M. Galt, deceased, do have and recover the sum of $2,027.01;

"And that William A. Gordon and J. Holdsworth Gordon, as executors of Osceola C. Green, surviving partner of Downman & Green, do have and recover the sum of $1,250.76;

"Amounting in all to the sum of $13,458.33, upon debts of the District of Columbia due and payable February 1, 1876, within the intent and meaning of the Act of February 13, 1895."

These judgments were entered June 22, 1896.

On the 3d of September, 1896, the District of Columbia prayed an appeal from these judgments (p. 67). No action was then taken upon this appeal.

On the 15th of February, 1897, this court decided in the case of *District of Columbia* v. *Johnson*, 165 U. S. 330, that it was erroneous in entering judgments based upon the act of 1895 for board rates to allow interest prior to the passage of that act.

Thereupon, pending the applications for appeal, the District of Columbia, on the 25th of February, 1897, moved for a new trial (p. 68) on the ground that the Court of Claims had allowed interest contrary to the construction placed upon the act of February 13, 1895, by this court.

Pending the hearing of this motion Congress March 3, 1897, enacted as follows, 29 Stat. L. 669;

"That the act approved February 13, 1895, entitled 'An Act to amend an Act entitled "An Act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction upon the Court of Claims to hear the same, and for other purposes," approved June 16, 1880,' be, and the same is hereby, repealed, and all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said Act shall be paid."

Five days later, on the 8th of March, 1897, the Court of Claims, as shown in the case of *In re Hall*, 167 U.S. 38, made the following order (p. 41):

"'The act of 13 February, 1895, 28 Stat. 664, having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments and all other papers in such suits be restored to and retained upon the files of the court without further proceedings being had.'"

Subsequently, on the 15th of January, 1900, the court entered an order overruling the motion for new trial (p. 68). In view of its order that no proceedings should be had on motions for new trial, this was equivalent to a decision that the judgments were not entered under that act but under the act of June 16, 1880.

The District of Columbia thereupon moved for and obtained an allowance of its appeal (p. 69).

2. Facts of This Claim.

We shall lay before the court in this statement only such facts as are pertinent to the claim of the appellee on whose behalf this brief is filed, leaving to counsel for other appellees the duty of developing the rights of their respective claimants.

The work for which payment is sought in this case was done on Fifth street, between D and H streets, N. E. (p. 35). It seems to have been at first erroneously credited to contract No. 243 (pp. 30–33), or to one of the two extensions thereof (pp. 34, 35). As a matter of fact neither that contract, nor either of its two extensions, nor any other of Connolly's contracts, embraces any work on this street. It was, however, recognized by the District authorities, and payment computed at the rates named in the first and second extensions of contract No. 243, which rates were (p. 35):

"The prices established and paid by the board of public works for work of a similar character, provided that payment shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value."

So computed the value of the work amounts to two thousand three hundred and twenty-seven dollars and ninety-one cents ($2,327.91). This balance has never been paid.

As a precaution against conflicting claims, said Connolly, at the suggestion of the defendant, procured from one William Hussey, in whose contract this work was supposed to be included, an assignment dated July 31, 1876, of his interest therein, and on the same day assigned $2,327 thereof to William M. Galt, the claimant in case No. 162, upon which assignment the said Galt bases his claim in said case (p. 35). Both of these assignments are set forth in Finding XVII (pp. 45, 46).

The judgment in favor of Galt's executrix is about three hundred dollars ($300) less than the amount of the value of the work, having been thus reduced by stipulation (pp. 64, 65) with other claimants.

3. Credits Claimed by Defendant.

Although it was nowhere claimed that any payment had been made for this particular work, it appears by the Findings of Fact that the District of Columbia, defendant, claimed certain balances to be due from Connolly, the original contractor, to it, arising out of alleged overpayments to Connolly in excess of contract rates. These were as follows:

(*A*) Overpayments under contract No. 243, amounting to $8,413.55.

The contract out of which these alleged overpayments arises was made with the Board of Public Works April 24, 1872. The work required to be done by the contract was (p. 30) "to grade Massachusetts avenue, from New Jersey avenue to Lincoln square, in the city of Washington, D. C." The price to be paid for the work was, by article 10 of the contract, to be as follows (pp. 32, 33):

"Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two hundred (200) feet, and one cent additional per cubic yard for every two hundred (200) beyond the above."

Such payments were, by article 12 (p. 33), to be "in lawful money of the United States."

After a large amount of work had been done under this contract, and several partial measurements and payments made, the work was suspended by the Board of Public Works under article 4 of the contract.

After the appointment of Commissioners under the act of June 20, 1874, at the request of Connolly work was resumed under this contract, and partial measurements and payments from time to time were made thereon (p. 33).

On May 4, 1875, a contract, styled the "First Extension of Contract No. 243," was made by the Commissioners of

the District of Columbia, who had succeeded to the Board of Public Works, with Connolly, by which it was agreed (pp. 34, 35)—

"That contract No. 243, in the series of contracts made by the board of public works of the District of Columbia, be, and the same is, hereby extended, with its various terms, conditions and stipulations, to embrace the following work, viz.:

"Grade upon the following streets, between the points named:

"B st. south, between 4th st. east and Boundary;

"C st. north, between 4th st. east and Boundary;

"A st. south, between 3d st. east and Boundary;

"D st. north, between 1st and 4th st. east;

"Delaware ave., between C st. north and Boundary;

"E st. north, between 2nd and New Jersey ave;

"6th st. east, between Mass. ave. and East Capitol st.;

"1st st. east, between C st. north and Boundary;

"or upon such and so many of these streets as the engineer of the District of Columbia shall determine. It is understood that the work herein described is in lieu of similar work relinquished on Massachusetts avenue, and the engineer aforesaid shall determine what amount of grading will be a just equivalent for work relinquished on said Massachusetts avenue, as contemplated by this agreement. And the said Daniel A. Connolly shall, under the direction of the engineer aforesaid, replace the old material on said streets—that is to say, reset the curbs and relay the brick foot pavements where necessary, according to specifications hereunto annexed.

"It is further agreed that the said Daniel A. Connolly shall receive the prices established and paid by the board of public works for work of similar character, provided that payment shall be made in the bonds issued by the sinking-fund commissioners of the District of Columbia, under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value."

On the 6th of October, 1875, the Commissioners made a further contract with Connolly, styled "Second Extension of Contract No. 243," whereby said contract No. 243 was extended to embrace the following work (p. 35):

"Relay the old material on Massachusetts avenue, between New Jersey avenue and Lincoln square, wherever directed by the engineer of the District of Columbia.

"It is further agreed that the work herein specified shall be completed by the first day of November, 1875, under penalty of forfeiture of all right and title to perform the same."

Then follows some provisions, as in the first extension, as to receiving the prices established and paid by the Board of Public Works, and for payment in bonds of the District of Columbia.

In computing payments for the work done under said contract No. 243, or one or both of its two extensions, the rate for increased length of haul was computed at the rates established and paid by the Board of Public Works, and not at the lower rates named in the original contract. One of these payments, amounting to $2,850.52, was made December 5, 1873 (p. 33), and was, therefore, under the original contract, as it was prior to the dates of either of the extensions thereof.

The second item, containing such alleged overpayment, was paid July 7, 1875, and amounted to $2,445.32. The work therein named was done after the resumption of work in 1874 (p. 34). Whether it was done after the date of the first extension, May 4, 1875, does not appear, nor whether it is for work mentioned in the original contract, or in that extension.

Another item of overpayment is dated July 27, 1875, and is for $2,687.71 (p. 34). This work was done after May 4, 1875, and is apparently a portion of the work named in the first extension of that date.

The remaining item of alleged overpayment was paid February 2, 1876, and is for $430 (p. 34). The payment was made after the dates of both extensions, and was for work done after the date of the first extension. Whether it was also after the date of the second extension does not appear.

It will thus be seen that of these four alleged overpayments all but the first were made on contracts which expressly stipulated for the rates which were actually paid. If all the alleged overpayments were conceded to the defendant, there would still be due under this contract $936.40. If none is credited, $9,349.95 would be due (p. 34). These balances include the $2,327.91 due to Galt as assignee for work done on 5th street, between D and H streets northeast, and which forms the subject of the present claim.

(*B*) On contract No. 349 (Finding VI, p. 36) overpayments for grading and hauling in excess of contract rates were made, amounting to $783.05. If these were not credited to the District, there would be due $785.56 on this contract, but, even if so credited, there would still be due the claimant $2.51.

(*C*) In making payments under contract No. 595 an excessive payment was made amounting to $240, which was paid February 9, 1875, through the board of audit. "If this excess be credited to the defendant, the claimant would be overpaid $173.35; if not so credited, the balance in favor of the claimant is $66.65" (p. 37).

(*D*) Under contract No. 665 a payment was made amounting to $1,568.62 in excess of the contract rates. "If this alleged overpayment were credited to the defendant, the claimant would be overpaid on this contract $1,012.37; if not so credited there is still due the claimant the sum of $556.25, as claimed in the second amended petition" (p. 37).

(*E*) Under contract No. 690 certain work was provided for on two blocks on First street east, from East Capitol to B street northeast. Payments were made for work done on these two blocks in excess of the contract rates to the extent of $2,331. There would be due if this could be claimed by the District $2,300.51, being the amount of the overpayment less $30.49, a balance otherwise remaining due. It is true that work was done on three other blocks not named in the contract. On these blocks the contractor was also paid the rates established and paid by the Board of Public Works, but as no contract limited the amounts so to be paid, it will probably not be claimed that the District is entitled to recover back such alleged overpayment.

(*F*) On contract No. 828 (Finding X, p. 39) it is conceded that $300.04 remains due and unpaid.

(*G*) On contract No. 1028 (Finding XI, p. 39) certain overpayments are claimed, amounting to $300. If this alleged overpayment is credited to the defendant, there will still be due to the claimant $1,645.09. If not so credited, there is due him $1,945.09.

(*H*) It also appears by Finding XII (pp. 39–41) that the District of Columbia claimed as a counter-claim certain amounts paid to one Albert Gleason as assignee of Connolly. These items were in excess of the contract rates to the amount of $5,062.02. They were paid to Gleason as assignee. "It does not appear that Daniel A. Connolly, or his administrator, ever ratified the act of Albert Gleason in receiving overpayments on claims presented to the board of audit, or ever received any benefit therefrom" (p. 41).

A summary of all the items of credit and of the counter-claim above stated will be given at the close of our brief.

II. BRIEF OF ARGUMENT.

1. The Claim.

It is difficult to perceive in what respect this judgment falls short of being amply sustainable under the act of 1880. No special contract limited the rate of payment. The claim was very properly computed by the District authorities at the current rates then established and being paid. This is ample evidence of a *quantum meruit* under the decision of this court in the case of *Clark* v. *United States*, 95 U. S. 539.

2. Credits and Counter-Claim.

It will probably be claimed, however, on behalf of the District of Columbia, appellant here, that, while the amount for which judgment has been rendered may be due for the particular work upon which the balance appears, it is more than offset by overpayments made to the contractor, Connolly, on other contracts.

To any defense based on this ground it is submitted that the position taken by the Court of Claims in its opinion delivered by Judge Davis (Record pp. 47, 48), hereinbefore quoted, constitutes a complete response. It appears by Finding XVIII (p. 46) that "Of all the assignments and powers hereinbefore set forth the defendants had due notice." No such claim as is here asserted seems ever to have been set up against this assignment until after the institution of the present litigation.

The proposition that must necessarily be maintained on behalf of the District of Columbia in this case is in brief this: That upon a suit by an assignee for full value to recover the amount of an unquestioned balance the District of Columbia is at liberty not only to set up defenses growing out of the same contract, but to reopen settlements made with full understanding of the facts

between the contractor and the District government, and to require the assignee to sustain the validity of every such settlement.

The question need only be asked, What would be the result if the same proposition were made on behalf of a claimant to reopen similar settlements? This question is answered by the decisions of this court in *United States* v. *Adams*, 7 Wall. 463; *United States* v. *Child*, 12 Wall. 232; *United States* v. *Justice*, 14 Wall. 535; *Mason* v. *United States*, 17 Wall. 73; *Savage* v. *United States*, 92 U. S. 382, 388; *Baird* v. *United States*, 92 U. S. 430.

The work on which the present claim is based appears by paragraph 6 of the petition (p. 7) to have been done between the 4th of May, 1875, and the 22d of March, 1876. With this statement of dates the findings of the court (p. 35) and of the referee (p. 55) are in harmony. It thus appears that this work was ordered by the District, and payment promised for the same in bonds of the District of Columbia (p. 35) at a time when the balances under which it is claimed that the overpayments arise had been fully made. (See particularly the alleged overpayments claimed in Findings VII, VIII and IX.) To hold in favor of the District on this point would be to declare that there never could be a valid settlement between a contractor and the District of Columbia on old contracts so that he might be at liberty to take up new work for the District, and that no one could safely take from him an assignment of a certified voucher for the work; and that the District was at full liberty to repudiate its agreement to pay for the work in bonds of the District of Columbia after the work was done, and, instead, to go back and reopen all old and long past transactions and not only recover the amount thereof from the original contractor but to wipe out the balance due

an assignee under an otherwise perfect assignment. To such a proposition this court has never given its assent.

Another fact not to be left out of sight is that by far the greater part of the alleged overpayments herein set up were made through the board of audit, a body established by the act which abolished the Board of Public Works, and all the other branches of the territorial government (Act of June 20, 1874, 18 Stat. L. 118–120). Without claiming that this board was in its composition a strictly judicial tribunal, we submit that Congress has in the very act which gave the court jurisdiction of this class of claims sufficiently expressed its intention that settlements made by that board shall not be disturbed. Section 8 of the Act of June 16, 1880, 21 Stat. L. 286 is as follows:

"No claim shall be presented to, or considered by the Court of Claims under the provisions of this act which was rejected by the Board of Audit."

If the Court of Claims can not consider a claim which was rejected by the board of audit, neither was it in contemplation of Congress that it should disturb a settlement by that board under its lawful powers—a contingency not expressly provided for for the reason that a disturbance of such settlement was not in the contemplation of Congress.

But we go further and insist that, even if the alleged overpayments be reopened and a settlement be now made between Daniel A. Connolly and the District of Columbia upon the strict basis of contract rates, the result would be that a balance will be found due from the District of Columbia to Connolly largely exceeding the amount of $2,027.01 for which the judgment of the court below was entered, and that, therefore, the District of Columbia is in no position to maintain a counter-claim, or set-off, thereto.

In the first place the alleged overpayment made to Albert Gleason as assignee may be left out of sight as of no consequence in the case. Connolly authorized Gleason to collect all amounts due him from the District of Columbia (p. 41). Gleason collected the alleged overpayments but did not pay them over to Connolly, nor did Connolly derive any benefit therefrom. This precise question was presented to this court in 1834 in the case of *United States* v. *Jones*, 8 Pet. 387. The decision is tersely summarized in the syllabus as follows:

"An order to receive from the secretary of war any balance due under a certain contract, does not authorize a payment of what is not due; and if paid, the person giving the order is not liable to refund."

This constitutes a conclusive authority against setting up any such balances, nor did the Court of Claims admit it even upon the first trial of this case, upon which it rendered a judgment against Connolly's assignee for the sum of $658.05 (p. 20).

That opinion thus summarized the process by which that balance was found due (p. 20):

"On contracts No. 209, 231, and 1035 there is due Connolly	$ 244 18
On contract No. 243 and extensions, with the Hussey assignment	936 40
On contract No. 349	2 51
On contract No. 1028	1,645 09
Total	$2,828 18
"Overpayments to Connolly on—	
Contracts Nos. 595 and 1057, made January 27, 1875	$173 35
Contract No. 665, made February 9, 1875	1,012 37
Contract No. 690, made December 31, 1873	2,300 51
Total	$3,486 23
"Leaving a balance in favor of the District of	$658.05."

Let us analyze some of the figures of this statement and see what is the result.

Under contract No. 243 and its extensions, and including also the present claim, there is found to be due to Galt only $936.40. This result is reached by charging Connolly not only with the overpayment of $2,850.52 made December 5, 1873 (p. 33), while the original contract was the only measure of the rights of the parties, but with $2,445.32, the alleged overpayment of July 7, 1875, made (p. 33) after work had been suspended and resumed, and, still worse, with the other two items Nos. 3 and 4 (top of page 34), aggregating $3,117.71, which were for work done after the new contract of May 4, 1875 (pp. 34–35), and which was apparently not covered by the original contract of 1872.

The rates at which payment was thus made are the precise rates fixed by the contract of May 4, 1875, styled the "First Extension of Contract No. 243," which rates are (p. 35) "The prices established and paid by the board of public works for work of similar character." Surely, unless the contract of April 24, 1872, bound the parties never thereafter to agree to any higher rates, even for different work, it is impossible to sustain any claim for the recovery back of the alleged overpayments numbered 2, 3, and 4 (pp. 33, 34), especially the last two.

We, therefore, ask the court in determining the amount due on an entire re-settlement between Connolly and the District of Columbia to refuse to allow the District credit for any such overpayments as those specified in said items 2, 3 and 4 (pp. 33, 34).

If we are right in this contention, the proper mode of ascertaining the balance due under this contract is to take the amount $9,349.95 (p. 34) as the amount due on contract 243 and its extensions, and deduct therefrom only the first item of overpayment (p. 33), amounting to

$2,850.52. This would leave the amount due under contract No. 243 and its several extensions, including the amount claimed in this case, $6,499.43. Applying this rule of computation, we should make the statement of account on page 20 read as follows:

On contracts No. 209, 231 and 1035 there is due Connolly	$244 18	
On contract No. 243 and extensions, with the Hussey assignment . .	6,499 43	
On contract No. 349	2 51	
On contract No. 1028	1,645 09	
Total		$8,391 21
Overpayments to Connolly on—		
Contracts Nos. 595 and 1057, made January 27, 1875	$173 35	
Contract No. 665, made February 9, 1875	1,012 37	
Contract No. 690, made December 31, 1873	2,300 51	
Total		3,486 23
Leaving a balance in favor of Connolly of		$4,904 98

This balance is, of course, more than sufficient to pay the present claim.

It is hardly necessary to add that, if the claimant is entitled to recover anything in this case, she is entitled to recover the same with interest from 1876, as allowed by the court below. The ruling of this court against the allowance of interest applies only to allowances under the act of 1895, now repealed by that of 1897. If the claim-

ant is entitled to recover under the original District Claims Act of 1880, interest should be allowed.

The referee reported in favor of the allowance of interest from February 1, 1876 (p. 66), and the court so adjudged.

The judgment in favor of the claimant, Harriet T. Galt, executrix of William M. Galt, looked upon as a judgment in her favor under the District Claims Act of June 16, 1880, for $2,027.01, upon debts of the District of Columbia, due and payable February 1, 1876, was correct and should be affirmed.

GEORGE A. KING,
Attorney for Harriet T. Galt,
Executrix, Appellee.

No. 237. 96.
Br. of Douglass for Appellees.

Office Supreme Court U.S.
FILED
APR 15 1901
JAMES H. McKENNEY,
Clerk.

Filed April 15, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 237.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

COLUMBUS J. ESLIN, ADMR., ETC., ET AL.

[Appeal from the Court of Claims.]

BRIEF FOR APPELLEES

In Case No. 280. Executors of Osceola C. Green, Surviving Partner, Etc.

J. W. DOUGLASS.
Attorney for Appellee.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 237.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

COLUMBUS J. ESLIN, ADMR., ETC., ET AL.

[Appeal from the Court of Claims.]

BRIEF FOR APPELLEES

In Case No. 280. Executors of Osceola C. Green, Surviving Partner, Etc.

STATEMENT.

Daniel Connolly, on the 1st of December, 1874, entered into a contract with Downman & Green, by which the latter were to receive from the District all bonds or certificates, and to receipt for money due to Connolly "for work done or to be done, under contracts No. 243 and 1028." The consideration for this, as expressed in the agreement, was the moneys advanced by the claimants to Connolly (Rec., p. 4, 51).

Immediately following this agreement and in pursuance of it, Connolly gave to the claimants a power of attorney (Rec., pp. 4, 42, 43 and 44), which was duly filed of record in the office of the District Commissioners (see Rec., p.), which authorized the claimants in Connolly's—

> "name, place and stead, to demand, ask, sue for, collect and receive all sums of money, bonds, or any other claims whatsoever which are due, owing, or payable to me from the District of Columbia, . . . arising from and done [or], to be done, on Massachusetts avenue, under contract No. 243," etc.

> "Of all the powers and assignments hereinbefore set forth the defendants had due notice" (Rec., p. 46).

That the sum of $1,250.76 is due the claimants in No. 280, and for which amount judgment was entered in the Court of Claims June 22, 1896 (Rec., p. 48 and 49), due and payable February 1, 1876 (Rec., p. 66).

Downman & Green furnished the money to carry on contracts 243 and 1028, and their advances to carry on the work amounted in February, 1876, to $58,000. This exceeded their receipts in the sum of $8,700.

On the 19th of October, 1895, on motion suggesting the death of Osceola C. Green, surviving partner of Downman & Green, No. 280, D. C., it was ordered that the suit be revived in the names of his executors, William A. Gordon and J. Holdsworth Gordon.

The statement has been curtailed so as to avoid reiteration; reliance has been placed in the argument upon the page references to the record.

ARGUMENT.

I.

The Attorney General contends that the over-payments to Connolly on contracts in which Downman & Green never had any interest or control, being contracts Nos. 595, 1057, 665, and 690 (Rec., p. 20) should be offset against the balances found due to Downman & Green under contracts No. 249 and 1028. This the Court of Claims refused in the most positive terms (Rec., p. 47), and we contend in exact accordance with the authorities.

> "A counterclaim is a cause of action against the plaintiff, and, unless the facts, if alleged in a separate action against the plaintiff, make out a cause of

action against him, they do not constitute a counterclaim."

Waite's Actions and Defs., Vol. 7, page 542, and cases cited.

Suppose, on this principle, the District had sued Downman & Green and alleged the overpayments on contracts 447, 527 and 693, as the cause of action, could a judgment have been obtained by the district when the evidence all showed that they (Downman & Green) had never had a dollar under those contracts; but that all their receipts had been for money under other contracts, and for work on other streets? That is exactly the position of the parties and facts here, and gives us, we contend, the right to the moneys due under 243 and 1028, without the offsets as attempted.

Again:

"The application of this rule is most frequently made in actions brought by assignees of the demands in suit; and if the plaintiff be such an assignee, no demand accruing to the defendant against the assignor can be enforced as a counterclaim."

Waite's A. & D. Vol. 7, page 542, and cases cited.

This rule illustrates the present case exactly. Downman & Green bring their action as "*assignees*" of the demand in their suit. The demand of the defendant accrued against Connolly, the "*assignor*" and therefore can not, under the principle last cited, "be enforced as a counterclaim against the assignees," Downman & Green.

There is another well settled rule of the courts that prevents the District from touching the proceeds found by the referee under contracts Nos. 243 and 1028.

As between Downman & Green and the District, they are, in this proceeding, both creditors of Connolly, claiming respectively certain sums due under contracts 243 and 1028, with Connolly also claiming the sums due under *eight other* contracts, Nos. 209, 231, 349, 595, 1057½, 665, 690 and 828. The rule referred to is this:

> "It may be laid down as the general rule, . . . that if a creditor has two funds, he shall take his satisfaction (if he may) out of that fund upon which another creditor has no lien."
>
> Waite's A. & D. Vol. 1, page 571, and cases cited.

This principle will prevent the District from taking her counterclaim out of the proceeds from 243 or 1028, for she has the whole of the eight other contracts to counterclaim on, and from which Downman & Green are altogether excluded, When the additional fact is considered, as shown by the record, that Connolly had as early as 1874 assigned all his interests in payments under contracts 243 and part, at least, of 1028, and the defendant duly notified, the argument in favor of Downman & Green becomes, we submit and earnestly contend, impregnable (Rec., pp. 20, 42, 43 and 51).

II.

In Finding No. 15 the Court of Claims expressly find:

> "That Downman & Green furnished the money to carry on contracts 243 and 1028 . . . and that their advances, in February, 1876 ($58,000), exceeded receipts in the sum of $8,700" (Rec., p. 44).

The agreement and power of attorney from Connolly to Downman & Green (Rec., pp. 42, 43 and 44) constitute a full and complete legal assignment, especially authorizing Downman & Green "to demand, ask, sue for, collect, and receive all sums of money, bonds," etc., "due or owing or payable to Connolly from the District of Columbia" (Rec., p. 42); and yet the Attorney General in his Brief, page 19, asks, "Do these instruments consitute an equitable assignment," etc.? The court below found (Rec., p. 46) that the appellant had "due notice of all the powers and assignments." Under these circumstances of notice if the District *had* paid to Connolly under contract 243 or 1028, which they did not, the appellant could not successfully defend by pleading its own wrong.

The reference at the foot of page 19 of the appellant's Brief is equally unfortunate, for the whole account when balanced, shows the District to be indebted under contract 243 to the amount of $9,529.95: and the court found (Rec., p. 44) that the final balance after a full accounting under both contracts (243 and 1028) was, in 1876, $8,700.

The rights of Downman & Green are clearly well founded, both legally and equitably.

The appellant, on page 18 of the brief, attempts to contradict the finding of the court below, where they found that "Downman & Green furnished the money to carry on contract 243 and 1028." This of course will not be considered seriously by this court. The appellant should have moved for an amendment of the finding in the court below; not having done so, the finding stands here for an absolute verity and unimpeached.

III.

One other point contended for remains to be considered—that of the allowance of "board rates." The appellant contends (Brief, p. 21) that "these allowances were illegal." Were they?

The contracts originally made with Connolly were at certain uniform rates. Subsequently, September 27, 1873, the municipal authorities increased the rates (Rec., p. 29).

This increase of rates grew out of the acknowledged fact that soon after the original contracts were made the price of all kinds of labor required under them went up by the increased demand in the District, and the contractors were obliged to pay more than they had anticipated. To cure this trouble there were but two ways: (1) to throw up the contracts; (2) or to ask the municipality for a proportionate increase of compensation. To have taken the first course would have been to leave the city and District torn to pieces as to its streets for months and possibly years. The second and wiser course was taken; and a fair adjustment made by a slight increase in compensation.

The following extract from a brief of the late Judge Shellabarger succinctly puts the legal view of the case on this question of the appellees:

> "Coming back now to the authorities upon the question of the power of a municipal government, like that administered by these Commissioners under the act of 1874, we call the attention of the court to the case of Meech *vs.* City of Buffalo, 29 N. Y. 198."

In this case the law on this point is laid down in the syllabus in this language:

> "A municipal corporation, having power to make a public improvement, and incidentally the power to contract for doing the work, may *voluntarily* increase the contract price where the circumstances will equitably justify it, unless prohibited by its charter from doing so."

That doctrine is thoroughly discussed in the opinion of Judge Wright, and a concurring opinion by Judge Johnson, and a further concurring opinion by Judge Mullen, all the judges concurring.

It was a proceeding on the part of Meech against the city to *enjoin* the city of Buffalo from collecting a *second* assessment on his property to pay an *additional* sum to a contractor beyond his contract price, and the court declined to enjoin the city, and fully sustained the right of the municipality to voluntarily increase the contract price as stated in the syllabus.

The same doctrine regarding the flexibility of municipal officer's powers to do justice is laid down in—

Bean *vs.* Jay, 23 Me. 117.
Baileyville *vs.* Lowell, 20 Me. 178.
Nelson *vs.* Milford, 7 Pick. 18.

And by Judge Dillon in his work on Municipal Corporations, section 398, in the following language:

> "If [referring to a municipal corporation] it has obtained the contract which, by mistake or a change

> of circumstances, it deems to operate oppressively upon the other party, an agreement to make an additional compensation or to modify or annul it, is not invalid for want of consideration."

In the foregoing we have referred particularly to the fact that the District Commissioners were not circumscribed in their power of contracting. This is equally true with the Board of Public Works. That board had the right to contract, and the act of June 20, 1874 (78 Stat. 119) expressly validated all its contracts, written and oral, by auditing claims founded thereon, and paying them.

IV.

On page 21 of the appellant's brief it is contended that the prerogatives and exemptions of sovereignty protect the municipality from the rule that mistakes of law can not be corrected. This, in regard to the payment or allowances of board rates under the original act of June 16, 1880. The brief uses the word "government" as descriptive of the District.

This court in the case of the Met. RR. Co. vs. The District of Columbia, U. S. Reports, 135, p. 1, held exactly the contrary of the appellant's contention on a parallel point There it was contended for the District that it was not bound by the Statute of Limitations on account of the prerogative and exemption of sovereignty, which is based on the same reasoning that exempts a sovereignty, State or National, from the plea of "mistake of law." Judge Bradley, delivering the opinion of the court, said:

> "We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between individuals."

Here we claim that if "board rates" were paid in "mistake of law," under the above ruling they can not be counterclaimed any more than if the question was one between individuals.

V.

By the repeal of the act of 1895, this case is to be determined (debt and interest) under the act of June 16, 1880, commonly called the "Original Act."

The 6th section of the act of 1880 provided that the judgments should be paid out of certain bonds, and then added this proviso:

> "That before the delivery of such bonds as are issued in payment of judgments rendered on the claims aforesaid, the coupons shall be detached therefrom from the date of the bonds to the day upon which such claims were due and payable," etc.

Under this proviso the Court of Claims always had to find that date, so that the Secretary of the Treasury could calculate the interest by cutting off the coupons that represented the time between the date of the bonds and the date the claim was found to have been "due and payable." Under the act of 1880, between 30 and 40 judgments were paid with interest as aforesaid, and there was no dispute about it. In these cases the court found that the interest was "due and payable, February 1, 1876" (Rec., p. 66). The claim in this case then is for $1,250.76, with 3.65 interest from February 1, 1876 (Rec., p. 66).

It may not be out of place to say in conclusion that the men who put their capital, labor and time into the work that has made the city of Washington the delight of the visitor and resident, famous for its streets, parkings and shade, should at least be remunerated for actual expenditures at the then current rates of labor and material.

It would seem a pity to mar this splendid record of effort and result by a conclusion of injustice to anyone concerned in its execution.

J. W. DOUGLASS,
Attorney for Appellee.

Original
No. 36.

FILED
OCT 1 1901
JAMES H. McKENNEY,
Clerk.

Br. of King for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Oct. 1, 1901.

THE DISTRICT OF COLUMBIA, *Appellant*,

v.

COLUMBUS J. ESLIN, Administrator of DANIEL A. CONNOLLY, deceased,

SAMUEL J. RITCHIE,

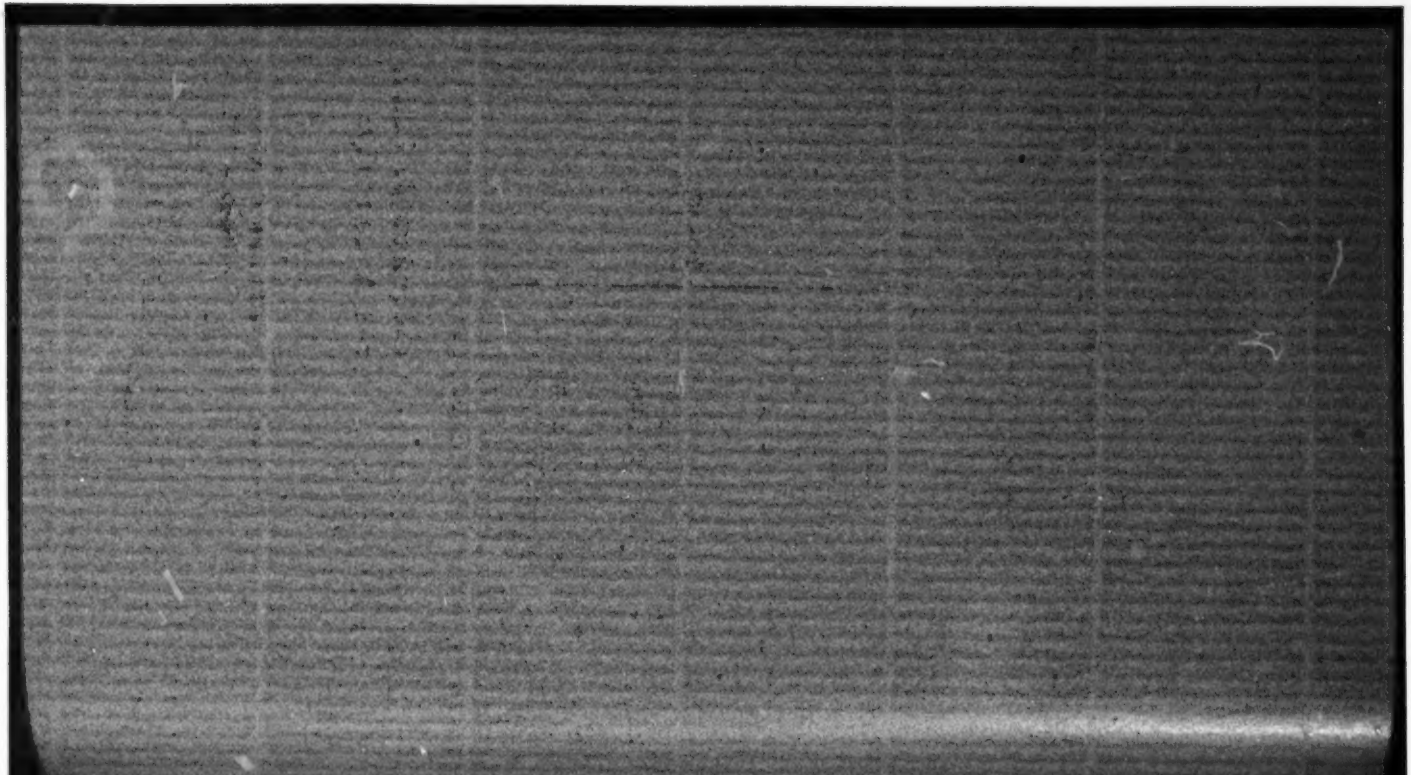
HARRIET T. GALT, Executrix of WILLIAM M. GALT, deceased, and

WILLIAM A. GORDON and J. HOLDSWORTH GORDON, Executors of OSCEOLA C. GREEN, surviving partner of DOWNMAN & GREEN.

No. 36.

Brief of Argument for Columbus J. Eslin, Administrator of Daniel A. Connolly.

WILLIAM B. KING,
Attorney for Appellee.



IN THE

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COLUMBUS J. ESLIN, Administrator of DANIEL A. CONNOLLY, deceased,

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WILLIAM A. GORDON and J. HOLDSWORTH GORDON, Executors of OSCEOLA C. GREEN, surviving partner of DOWNMAN & GREEN.

No. 36.

I. Statement of the Case.

The statement of the case contained in the brief of George A. King, Esq., in behalf of Harriet T. Galt, executrix of William M. Galt, deceased, one of the appellees in this cause (pp. 1–12 of said brief), is hereby admitted to be correct and adopted.

In addition to the facts stated in said brief, which include only those material to the claim of said Harriet T. Galt, executrix, the following further facts are material to this cause:

The balances claimed to be due to the present claimant and appellant originated in a large number of written contracts made by Daniel A. Connolly, intestate, of whose estate the present claimant is administrator, with the

District of Columbia for the improvement of the streets of Washington. The facts in regard to that claimed by Harriet T. Galt, executrix of William M. Galt, are fully stated in sub-division 2 of the statement of the case contained in the brief for Harriet T. Galt, executrix (pp. 6, 7). The facts as to the balances on other contracts are as follows, as shown by the findings of the Court of Claims entered May 28, 1894 (pp. 28–46), and the report of the referee of that court, filed about June 22, 1896 (pp. 50–64), which are in harmony with some slight exceptions hereinafter noted:

1. Contracts Nos. 209, 231 and 1035.

As to these three contracts it is found by the court (Finding II, Record, p. 28) that there was due on these three contracts the amount claimed ($244.18). The referee's report shows the amounts as follows:

Contract No. 209	$199 92
" " 231	1 73
" " 1035	42 53
	$244 18

2. Contract 243 and Extensions Thereof.

The contract No. 243 is dated April 24, 1872, and was made with the Board of Public Works. The facts in regard to this contract and its two extensions, so far as they are material to the credits claimed by the defendant, are stated in paragraph A of sub-division 3 of the brief in behalf of Harriet T. Galt (pp. 8–11 thereof).

According to the findings of the court in 1894, if the overpayments alleged to have been made under this contract are credited to the defendant, there will still be due the claimant under this contract and the extensions thereof nine hundred and thirty-six dollars and forty

cents ($936.40). If they are not credited, nine thousand three hundred and forty-nine dollars and ninety-five cents ($9,349.95) will be due, including the two thousand three hundred and twenty-seven dollars and ninety-one cents ($2,327.91) assigned to William M. Galt, and for which his executor has recovered judgment for two thousand and twenty-seven dollars and one cent ($2,027.01) (Record, pp. 34, 35).

A revised finding by the referee (pp. 53–57) shows this balance to be $9,529.95 instead of $9,349.95.

3. Contract No. 349.

The facts as to this contract are set forth in Finding VI (p. 36) and referee's report (pp. 57, 58). Certain alleged overpayments are claimed, consisting of excess of price paid beyond the contract rate on certain items of payment. The finding is that—

"If these alleged overpayments are credited to the defendant there will still be due the claimant $2.51. If not so credited there will be due him $785.56, the amount claimed. Last payment made December 1, 1874."

4. Contracts Nos. 595 and 1057½.

A balance is found due under this contract in favor o the claimant of sixty-six dollars and sixty-five cents ($66.65) (Finding VII, pp. 36, 37; referee's report, pp. 58, 59). It is claimed, however, to be wholly offset and a balance found on the other side by alleged overpayment in excess of contract rates made by authority of the board of audit, and which would show an overpayment of one hundred and seventy-three dollars and thirty-five cents ($173.35).

5. CONTRACT No. 665.

The facts as to this contract are stated in Finding VIII (p. 37) and referee's report (p. 59). There is due under this contract the sum of five hundred and fifty-six dollars and twenty-five cents ($556.25), unless certain claimed overpayments made by authority of the board of audit are allowed as offsets, in which case there would not only be nothing due, but an overpayment to the claimant under this contract will be shown, amounting to one thousand and twelve dollars and thirty-seven cents ($1,012.37).

6. CONTRACT No. 690.

The facts in relation to the preparation and execution of the contract in this case, as set forth in Finding IX (pp. 37, 38) and the referee's report (pp. 60, 61), are quite obscure. The contract, however, as it was finally executed embraces work covering two blocks only, and provided for payment at certain rates for the work on those blocks. As actually done, however, the work covered five blocks. There is still due the contractor the sum of thirty dollars and forty-nine cents ($30.49) on this work. This balance is, however, claimed to be met by certain alleged overpayments. If these alleged overpayments are allowed on that portion of the work which is embraced in the two blocks covered by a different contract, the overpayments would amount to two thousand three hundred dollars and fifty-one cents ($2,300.51). If the contract rates are regarded as covering the whole five blocks, the overpayments would amount to nine thousand and sixty-one dollars and four cents ($9,061.04).

7. CONTRACT No. 828.

"This contract was made August 8, 1874. The work amounted to $1,159.66, of which $300.04 remains due

and unpaid" (Finding X, p. 39; referee's report, pp. 61, 62).

8. CONTRACT No. 1028.

This contract provided for grading on two different streets, and provided a rate of thirty cents a cubic yard for excavating and hauling, not exceeding two hundred feet, and one cent a cubic foot for every additional two hundred feet of haul. It also contained a provision "Grading of old graveled streets, for first ——— feet per cubic yard, ——— cents." There is due this claimant on that contract one thousand nine hundred and forty-five dollars and nine cents ($1,945.09) (Finding XI, p. 39; referee's report, pp. 62, 63). As against this there is a claim for overpayment arising from a payment of forty (40), instead of thirty (30) cents per cubic yard on a portion of the work, making a difference of three hundred dollars ($300). This amount was paid through the board of audit. By its allowance the amount due the claimant would be reduced to one thousand six hundred and forty-five dollars and nine cents ($1,645.09).

Recapitulation.

The following statement shows the amount due according to the findings on each one of the contracts upon which a balance is claimed in this case, without reference to the alleged overpayments or set-offs:

	Findings of Court, 1894.	Report of Referee, 1896.
1. Contracts Nos. 209, 231 and 1035	$244 18	$244 18
2. Contract No. 243 and its two extensions	9,349 95	9,529 95
3. Contract No. 349	785 56	785 68
4. Contracts Nos. 595 and 1057½	66 65	66 65
5. Contract No. 665	556 25	556 25
6. Contract No. 690	30 49	30 49
7. Contract No. 828	300 04	300 04
8. Contract No. 1028	1,945 09	1,945 09
Total	$13,278 21	$13,458 33

The difference between the findings of the court and the report of the referee is only $180.12, and arises (save as to 12 cents difference on Contract 349) out of a recomputation on Contract No. 243 and its extensions.

Orders of Board of Public Works.

Some of the overpayments claimed on behalf of the District of Columbia arise from the execution of orders made by the Board of Public Works and entered upon its journal, set forth in Finding III (pp. 28–30), and which may be summarized as follows:

1871.

Sept. 14, order allowing for "Grading per cubic yard, earth to be deposited where directed without extra charge, 20 cents."

Sept. 26, order providing that the preceding order was not intended to apply to old graveled streets ordered to be cut down, but that forty cents should be allowed for all such grading for the depth of two feet below the surface.

1872.

Jan. 22, order fixing the price of grading at thirty cents per cubic yard, including hauling, not to exceed two hundred feet, and for each additional two hundred feet, one cent per cubic yard.

July 17, order that the advanced rates of the preceding order should apply only on new contracts, and the old rates should be adhered to on contracts made prior to the order increasing prices.

1873.

July 15, price for hauling earth established at one and one-fourth cents per cubic yard for every foot of haul over first two hundred feet since June 1, 1873.

Sept. 23, the auditor of the Board of Public Works calls attention to the fact that contractors ask for an allowance of one and one-fourth cents per yard for every yard hauled one hundred feet more than two hundred feet, on the ground that they have to stand a discount of twenty per cent. on their paper.

Sept. 27, the Board of Public Works notifies the auditor in response that in the settlement of such accounts one and one-fourth cents per cubic yard for each additional one hundred feet beyond the first two hundred feet for all work done since January 1, 1873, will be allowed.

II. BRIEF.

History of the Case.

The claim of Daniel A. Connolly against the District of Columbia is of long standing. It arises out of contracts made with the late Board of Public Works of the District of Columbia, and in a few instances with their successors in office, the Commissioners of the District, in the years 1872, 1873, 1874 and 1875. The present claim has been in course of prosecution by the administrator of Connolly and three different assignees in the Court of Claims for twenty years. After a number of hearings, in which various and sometimes conflicting results were arrived at, the Court of Claims finally on the 22d of June, 1896, rendered the judgments from which this appeal was taken.

By these judgments it allowed to Columbus J. Eslin, administrator of Daniel A. Connolly, the sum of four thousand eight hundred and forty-one dollars and twenty-six cents ($4,841.26); to Harriet T. Galt, as executrix of William M. Galt, two thousand and

twenty-seven dollars and one cent ($2,027.01) and William A. Gordon and J. Holdsworth Gordon, executors of Osceola C. Green, surviving partner of Downman & Green, one thousand two hundred and fifty dollars and seventy-six cents ($1,250.76); and to Samuel J. Ritchie five thousand three hundred and thirty-nine dollars and thirty cents ($5,339.30), amounting in all to thirteen thousand four hundred and fifty-eight dollars and thirty-three cents ($13,458.33), upon debts of the District of Columbia, due and payable February 1, 1876 (Transcript of Record, p. 66).

In its judgment the court professed to base this action upon the act of February 13, 1895 (28 Stat. L. 664), by which it was provided that "The Court of Claims shall allow the rates established and paid by the Board of Public Works."

Subsequently, however, Congress, by the act of March 3, 1897 (29 Stat. L. 669), repealed the act of February 13, 1895.

After the passage of the latter act a motion for new trial came on to be heard before the Court of Claims, who, after hearing the same, on the 15th of January, 1900, overruled the motion (p. 68).

By this action the judgments rendered June 22, 1896, were in effect held to be good and valid judgments against the District of Columbia under the act of June 16, 1880 (21 Stat. L. 284), which originally conferred jurisdiction of this class of cases upon the Court of Claims.

That this position is well founded, and that the judgment in question, so far as it awards to the claimant, Columbus J. Eslin, as assignee of the deceased contractor, Daniel A. Connolly, the sum of four thousand eight hundred and forty-one dollars and twenty-six cents ($4,841.26) is correct will be the object of this brief to show.

The Issues.

It can not be denied that every item which goes to make up the total set forth in the recapitulation of the findings of the Court of Claims contained in this brief, *ante*, p. 5, is reached by allowing the representatives of the contractor no more than the rates specified in the original contracts between him and the District of Columbia.

The only question is, whether the District of Columbia should be permitted to recover back as overpayments sums paid with full knowledge of the facts, and either (as in the case of Contract 243) through the action of a fair and impartial commission, or (as in the case of nearly all the other contracts) through the Board of Audit, a quasi-judicial body.

First Judgment of the Court of Claims.

The result at which the Court of Claims arrived on the first trial of this case will be found stated in its opinion (Record, p. 20). The computation there made results in finding a balance in favor of the District of Columbia of $658.05. The fallacy of the process by which this result was reached is demonstrated in the brief already filed on behalf of Harriet T. Galt, executrix of William M. Galt, and was, in effect, admitted by the court by its order (p. 27) granting a new trial, as well as by its opinion (pp. 46–48) on the new trial.

A computation is given on page 18 of the Galt brief which results in a balance in favor of Connolly of $4,904.98. This result, however, is only reached by the allowance of every possible credit in favor of the District of Columbia. Such, of course, was all that was necessary in the argument of the Galt case.

The entire amount claimed by Galt in his original petition (Transcript of Record, pp. 6–9) and found due him by the findings of the court (p. 35) was only

$2,327.91. Hence it was not incumbent upon counsel for his executrix to do any more than show a sufficient amount due from the District to Connolly to meet that particular indebtedness. This was especially true in view of the stipulation among the parties for distribution of the sum found due, whereby it was agreed among them (p. 64) that the Galt claim was in no event to be reduced below the sum of two thousand dollars.

Overpayment Claimed on Contract 243.

The item of alleged overpayment (p. 33 of Transcript of Record), amounting to $2,850.52, ought not to be deducted from the amount otherwise due on this contract.

It is found by the Court of Claims (Transcript of Record, p. 33):

"A controversy having arisen between Connolly and the Board of Public Works in respect of the amount of work done under the original contract No. 243, the matter was referred, on November 20, 1873, for adjudication to a commission consisting of S. T. G. Morsell, Thomas M. Plowman, Joseph F. Collins, and W. P. Bell, and a settlement of the account under said original contract was made in accordance with the award of said commission, as reported by that body to the Board of Public Works November 27, 1873."

It is true that the court adds in immediate sequence, "There is no sufficient evidence to support this statement of the referee." A reference to the opinion of the court (p. 47), however, shows that the Court of Claims had no doubt as to the facts submitted to the commission in question, but held adversely to the validity of their action in the allowance of board rates instead of contract rates.

The court says in its opinion (p. 47):

"There is no dispute in this matter as to the amount of work done. The point is that Connolly was allowed

board of works rates instead of his contract rates in this payment. We do not consider that the referee's report (and we have no other evidence) shows a submission to an arbitration which could produce an award binding and conclusive upon the District, or that the decision of these commissioners effected such a settlement as amounts in law to an accord and satisfaction. On the contrary, this report, in our opinion, simply shows a payment made upon the statement of adjusters, appointed in the course of business, prepared upon the assumption that Connolly should be allowed board rates and not contract rates, an assumption held by this court to be unwarranted."

It thus appears by the opinion of the Court of Claims,—

1. That there is not now any dispute as to the amount of work done and that the contractor was paid for that amount and for no more.

2. That the question of how much work he did as well as how much he should be paid for it was submitted to a commission or board of arbitration, who reported not only what amount of work he had done, but what sum he should be paid for it.

3. That he was paid that sum and received it in satisfaction of that amount of work done.

This court has repeatedly sustained the validity and finality of payments made or new contracts entered into in settlement of disputed rights under an original contract. *United States* v. *Clyde*, 13 Wall. 35; *Mason* v. *United States*, 17 Wall. 67; *Sweeny* v. *United States*, 17 Wall. 75; *Silliman* v. *United States*, 101 U. S. 465. According to these decisions, there is no warrant for the attempt of learned counsel for the District to disturb the validity of the payment made under the award of this commission, or to demand that such payment be set off against sums found due for other work on either this or different contracts.

The views of this court on the subject of voluntary payments have recently been given in the case of *United States* v. *Edmondston*, 181 U. S. 500. It is held in that case that where money is voluntarily paid to the government without objection or protest, it can not be recovered back even though the law would not have obliged the party to pay it.

The same principle applies with very great force to the case of a contract with the District of Columbia for public improvements, and especially where the amount paid was not only no more than a fair and reasonable price for the work, but where it was paid by authority of an award of a fair and honest commission.

Suppose the case reversed and the commission had allowed less than contract rates. Would the contractor have been heard afterwards to say that his work was really worth more or that the contract entitled him to more? Clearly not, as is shown by repeated decisions of this court. Yet the District of Columbia and the contractor in this instance stood on exactly the same footing. This court decided in the case of *Metropolitan R. R.* v. *District of Columbia*, 135 U. S. 1, that the District of Columbia is, in general, subject to the same rules as are individuals. Every one of the cases cited to the contrary of this proposition in the brief of the appellant (p. 21) is a United States case, and prerogatives of sovereignty applied in those cases as they can not apply in the case at bar, which pertains only to a municipal corporation.

Overpayments through Board of Audit.

For the same reason the alleged overpayments to Connolly on Contracts Nos. 595, 1057½, 665 and 690, which are summarized on page 18 of the Galt brief and amount to $3,486.23, can not be sustained as the basis of counterclaim. The payments made on all but the last of these

contracts are found by the Court of Claims (Findings VII and VIII, pp. 36, 37) to have been made through the Board of Audit. These were deliberately made through an accounting body which, even if not strictly judicial, was appointed by the law to determine these very questions (Act June 20, 1874, § 6, 18 Stat. L. 118–120). The law made payments to a contractor through this board of audit conclusive. "No claim shall be presented to or considered by the Court of Claims under the provisions of this act which was rejected by the Board of Audit" (Act June 16, 1880, § 8, 21 Stat. L. 286).

Common fairness requires the application of the converse principle,—that a payment once made through the Board of Audit shall be regarded as a finality.

Overpayments on Contract 690.

The alleged overpayment on Contract No. 690 presents, if possible, even less equity in favor of the District. A contract was made for doing work on two blocks on First street east. The work was in fact done on five blocks, embracing the two named in the contract and three others. All were paid for at the rates established and paid by the Board of Public Works. "Under what arrangements this additional work was done does not appear" (Record, p. 38). In the absence of any further finding as to a contract for the additional three blocks and in view of the fact that the rates established and paid by the Board of Public Works and commonly known as "board rates," were in fact paid for the whole five blocks, the only possible explanation of the transaction is that it was part of the consideration for doing the additional three blocks, that the whole five, including the two named in the original contract, should be paid for at board rates.

There was nothing immoral or unfair about such an arrangement and we submit there was nothing illegal about it.

To raise the rates above those named in the original contract without any new consideration may not have been within the powers of the Board of Public Works; but to raise those rates upon a new and valuable consideration was entirely within their powers.

It is not inconsistent, indeed, with the findings of the Court of Claims, to suppose that some new and formal contract was entered into embodying just such an arrangement as we have suggested to be the one that probably was made. We need not go as far as this to explain the arrangement. It is quite enough to sustain its validity if it be shown, as the findings do show, that under some arrangement the whole five blocks were done at a uniform price; and it matters not that as to two of those blocks, the price was somewhat higher than specified in the original contract.

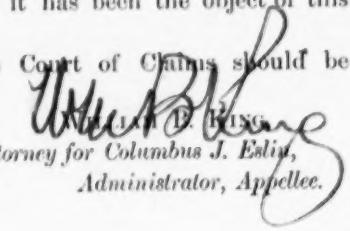
There should, therefore, be no deduction on account of alleged overpayments on any of the contracts.

Conclusion.

Having now discussed the questions of detail arising in this cause, we submit that the recent decision of this court in *District of Columbia* v. *Tally*, 182 U. S. 510, is conclusive in favor of this judgment as a whole. The report of a referee appointed and acting in pursuance of the District Claims Act, is there treated as *prima facie* correct. Having been made the basis of a judgment of the Court of Claims, it will be presumed to be correct until errors in it are made to appear. That there are no

such errors in the referee's report, or in the action of the Court of Claims thereon, it has been the object of this brief to show.

The judgment of the Court of Claims should be affirmed.



WILLIAM B. KING,
Attorney for Columbus J. Eslin,
Administrator, Appellee.

Supreme Court of the United States.

No. 36.—October Term, 1901.

The District of Columbia, Appellant, vs. Columbus J. Eslin, Administrator of Daniel A. Connolly, deceased, et al. } Appeal from the Court of Claims.

[November 4th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

By an act of Congress approved June 16th 1880, *c.* 243, the jurisdiction of the Court of Claims was extended to all claims then existing against the District of Columbia arising out of contracts by the late Board of Public Works and extensions thereof made by the Commissioners of the District, as well as to such claims as had arisen out of contracts by the District Commissioners after the passage of the act of June 20th 1874, (18 *Stat.* 116, *c.* 337,) and all claims for work done by the order or direction of the Commissioners and accepted by them for the use, purposes or benefit of the District prior to March 14th 1876. It was provided that all such claims against the District should in the first instance be prosecuted before the Court of Claims by the contractor, his personal representatives or his assignee, in the same manner and subject to the same rules in the hearing and adjudication of the claims as the court then had in the adjudication of claims against the United States. 21 *Stat.* 284, 285, §§ 1, 2.

By the same act it was provided that if no appeal was taken from the judgment of the Court of Claims in the cases therein provided for, within the term limited by law for appealing from the judgments of that court, "and in all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court where the same are affirmed in favor of the claimant, the sum due thereby shall be paid, as hereinafter provided, by the Secretary of the Treasury." § 5.

These consolidated suits were brought under the above act, and within the time limited by its provisions.

In the progress of the cause a judgment was rendered in one of the cases in favor of the District for $658.05, and in the others the petitions were severally dismissed. New trials were granted in each case, and time was given for further proof.

By an act of Congress approved February 13th 1895, c. 87, amendatory of the above act of June 16th 1880, it was provided that in the adjudication of claims brought under the act of 1880 "the Court of Claims shall allow the rates established by the Board of Public Works; and whenever said rates have not been allowed, the claimant or his personal representative shall be entitled, on motion made within sixty days after the passage of this act, to a new trial of such cause." 28 *Stat.* 664.

The cases were heard on the exceptions of the defendant to a referee's report, and the aggregate amount found due from the District was $13,458.33. And the record states that upon the facts set forth in the referee's report "the court, under the act of February 13, 1895, (28 *Stat.* 664,) and in accordance with the agreement of the parties, decides as conclusions of law as to the said sum of $13,458.33, so found due from the District of Columbia, that the several claimants named below each recover judgment against the United States in the amounts stated, viz." Here follows, in the record, a statement of the amount found due each claimant, the aggregate being the above sum.

The order referring the cause for a statement of the several accounts was made after the passage of the act of February 13th 1895, and the referee's report was made pursuant to the provisions of that act.

In accordance with the findings of fact and of law the court, on the 22d of June 1896, entered final judgment in favor of the respective claimants for the amounts found due them respectively, the judgment upon its face purporting to be "within the intent and meaning of the act of February 13th 1895."

On the 3d of September 1896 the District of Columbia, by the Attorney General of the United States, made application for and gave notice of an appeal to this court. Subsequently, February 25th 1897, the District moved to set aside the judgment of June 22d 1896 and to grant a new trial.

While the motion for new trial was pending Congress passed the act of March 3d 1897, c. 387, making appropriations for the expenses of the government of the District for the fiscal year ending June 30th 1898. That act among other things provided that the above act of Feburary 13th 1895, "be, and the same is hereby, repealed, and *all proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid.*" 29 *Stat.* 665, 669.

Our attention was called by counsel to the case of *In re Hall*, 167 *U. S.* 38, 41, in which it is stated that the Court of Claims made the following general order: "The act of 13 February 1895, 28 *Stat.* 664, having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments and all

other papers in such suits be restored to and retained upon the files of the court without further proceedings being had." This order is not found in present record.

What was the effect of the act of 1897 upon the power of this court to re-examine the final judgment of the Court of Claims in these cases? In our opinion, there can be only one solution of this question.

The present cases were brought under the act of 1895, and were determined with reference to its provisions. In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, and the express prohibition of the payment of judgments theretofore rendered, any declaration by this court as to the correctness of the final judgment entered by the Court of Claims under the act of 1895 would be useless for every practical or legal purpose, and would not be in the exercise of judicial power within the meaning of the Constitution. It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the Government. It seems therefore clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties. What was said by Chief Justice Taney in *Gordon* v. *United States*, 117 *U. S.* 697, 702, may be here repeated. After stating that this court should not express an opinion where its judgment would not be final and conclusive upon the rights of the parties, and that it was an essential part of every judgment passed by a court exercising judicial power that it should have authority to enforce it, or to give effect to it, the Chief Justice said: "It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress." See also *Hayburn's Case*, 2 *Dall.* 409; *United States* v. *Ferreira*, 13 *How.* 40, 46; *In re*

Sanborn, 148 *U. S.* 222, and *Interstate Commerce Commission* v. *Brimson*, 154 *U. S.* 447, 483, 486.

It results that as no judgment now rendered by this court would have the sanction that attends the exercise of judicial power, in its legal or constitutional sense, the present appeal must be dismissed for want of jurisdiction and without any determination of the rights of the parties.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.